No. 95-1503-CFX Title: Richard Mack, Sheriff, Graham County, Petitioner
v.
United States

Docketed: March 20, 1996 Court: United States Court of Appeals for the Ninth Circuit

Vide:
95-1478

Entry	Date	Proceedings and Orders
	Mar 18 1996	Petition for writ of certiorari filed. (Response due May 20, 1996)
	Apr 9 1996	Order extending time to file response to petition until May 20, 1996.
	Apr 9 1996	Supplemental brief of petitioner filed.
	May 15 1996	Brief of respondent United States filed.
	May 20 1996	Brief amicus curiae of Wyoming Sheriffs Association filed.
	May 22 1996	DISTRIBUTED. June 7, 1996
	Jun 10 1996	REDISTRIBUTED. June 14, 1996
	Jun 17 1996	Petition GRANTED. SET FOR ARGUMENT December 3, 1996. **********
	Jul 15 1996	Order extending time to file brief of petitioner on the merits until August 16, 1996.
	Jul 25 1996	Joint appendix filed.
	Aug 15 1996	Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
	Aug 15 1996	Brief amici curiae of Colorado, et al. filed. VIDED.
	Aug 16 1996	Brief amicus curiae of Law Enforcement Alliance of America filed. VIDED.
	Aug 16 1996	Brief amicus curiae of National Rifle Association filed. VIDED.
	Aug 16 1996	Brief amici curiae of Council of State Governments, et al. filed. VIDED.
	Aug 16 1996	Brief of petitioner Richard Mack, Sheriff filed.
	Aug 16 1996	Brief amici curiae of Doctors for Integrity in Policy Research, et al. filed.
	Aug 30 1996	Record filed.
	Sep 6 1996	Order extending time to file brief of respondent on the merits until October 10, 1996.
	Sep 6 1996	Record filed.
	Oct 10 1996	Brief amici curiae of Coalition to Stop Gun Violence, et al. filed. VIDED.
	Oct 10 1996	Brief amicus curiae of AFL-CIO filed. VIDED.
	Oct 10 1996	Brief amici curiae of Maryland, et al. filed. VIDED.
	Oct 10 1996	Brief amicus curiae of Association of the Bar of the City of New York filed. VIDED.
	Oct 10 1996	Brief amici curiae of Senators Herb Kohl, et al. filed. VIDED.
	Oct 10 1996	Brief of respondent United States filed. VIDED.
	Oct 10 1996	LODGING consisting of one copy of the Registration Regulations Prescribed by the President Under Authrity of the Act of Congress Approved May 18, 1917 submitted

No. 95-1503-CFX

Entry	Date	Proceedings and Orders
		by the Socitor General
	Oct 10 1996	Brief amici curiae of Handgun Control, Inc., et al. filed. VIDED.
	Oct 23 1996	Motion of petitioner Mack for divided argument filed.
	Oct 30 1996	Opposition of petitioner Printz to motion of petitioner Richard Mack for divided argument filed.
	Nov 1 1996	Reply of petitioner Mack to opposition of motion for divided argument filed.
	Nov 6 1996	CIRCULATED.
	Nov 12 1996	Motion of petitioner Mack for divided argument DENIED.
	Nov 12 1996	Reply brief of petitioner Richard Mack filed.
	Nov 26 1996	LODGING consisting of 12 copies of an "Open Letter to all State and Local Law Enforcement Officials", from the Dept. of Treasury, ATF, submitted by the Solicitor General and distributed
	Dec 3 1996	ARGUED.
	Dec 9 1996	Letter from counsel for the petitioner in compliance with request at oral argument received and distributed.

Supreme Court, U.S.
FILED

951503 MAR 18 1996

No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

SHERIFF RICHARD MACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress exceeds its Commerce Clause powers when it orders State officials, themselves neither engaged in nor interfering with interstate commerce, to exercise their police powers with regard to commerce.

2. Whether a Federal statute requiring State officials to investigate and pass upon the background of each handgun purchaser can be reconciled with the Tenth Amendment as construed in *New York v. United States*, 505 U.S. 144 (1992), on the claimed distinction that it commandeers a State's labor rather than its policymaking.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Sheriff Richard Mack and the United States of America. Neither has parent companies or wholly or nonwholly owned subsidiaries.

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Petitioner Sheriff Richard Mack requests that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995) and is reproduced in the Appendix ("App.") at 1. The order of the Court of Appeals denying Petitioner's petition for rehearing is unpublished, and is reproduced at App. 24. The opinion of the United States District Court is reported as *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994) and is reproduced at App. 26.

JURISDICTION

On September 8, 1995, the Court of Appeals reversed in part, affirmed in part, and dismissed in part the judgment of the District Court, thereby upholding the validity of the statutory provisions in question. On December 19, 1995, the Court of Appeals denied Petitioner's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, §8 of the Constitution of the United States provides:

> Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States. . . .

Amendment 10 to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Pub. L. 103-159, 107 Stat. 1536 (1993), codified as 18 U.S.C. §§922(s), 924, 925A, is reproduced in full at App. 51. As codified, it provides in relevant part:

18 U.S.C. §922(s):

> (1) . . . . it shall be unlawful for any . . . licensed dealer to sell, deliver, or transfer a handgun . . . unless. . . .
>
> (A)(i) the transferor has –
>
> (I) received from the transferee a statement of the transferee containing the information described in paragraph (3);. . . .
>
> . . . .
>
> (III) within 1 day . . . provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee. . . .

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. §924(5):

Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both."

18 U.S.C. §925A:

Any person denied a firearm pursuant to subsection (s) or (t) of section 922 –

. . . .

(2) who was not prohibited from receipt of a firearm . . . may bring an action against the State or political subdivision responsible for . . . denying the transfer . . . for an order directing that . . . the transfer be approved. . . . In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Federal law has long prohibited the receipt of firearms by certain classes of persons. These are defined with varying degrees of clarity and complexity, but generally

include those convicted of certain offenses[1] and who have not received pardon, restoration of civil rights, or Federal relief from disabilities, undocumented aliens, users of illicit drugs, those who have been the subject of certain mental adjudications, those given dishonorable military discharges, persons who have renounced American citizenship, and those subject to certain domestic restraining orders. 18 U.S.C. §922(g), (n). Persons purchasing from a Federally-licensed firearms dealer are required to attest that they fall within none of these categories; the attestation is available for inspection by Federal agents, who may bring Federal charges as appropriate. 18 U.S.C. §923(g)(1)(A),(B); 27 C.F.R. §§178.124, 178.161.

With the expressed intent of increasing the effectiveness of these restrictions, Congress enacted Pub. L. 103-159, 107 Stat. 1536 (1993). That statute envisioned an eventual "permanent system" whereby each handgun purchaser would be checked against an automated Federal database of prohibited purchasers. Since no such Federal database exists,[2] the statute created an "interim system" under which duties would be placed upon State

---

[1] In general, those convicted of an offense punishable by imprisonment of more than a year, excepting certain business offenses and offenses denominated misdemeanors and punishable by no more than two years' imprisonment. 18 U.S.C. §921(a)(20). "Open-ended" offenses are treated in accord with the law of the jurisdiction of conviction. *Id.*

[2] NCIC reflects outstanding warrants; State criminal records are of varying detail, often reflecting arrests but not convictions, let alone restorations of civil rights. Centralized records of the other categories – dishonorable discharges, mental adjudications, domestic restraining orders, etc. – simply do not exist.

officials for five years, or until the Federal system is funded and functional.

Under the interim system, every Federally-licensed firearms dealer is required to send a Federal form, giving notice of each handgun sale, to his "Chief Law Enforcement Official" (CLEO), a term defined to exclude Federal, and include State, law enforcement officials. 18 U.S.C. §922(s)(8). The CLEO is in turn required[3], within five business days, to make reasonable effort to determine whether each purchaser so reported is forbidden to receive firearms by any Federal, State, or local law. 18 U.S.C. §922(5)(2). (Paradoxically, the minimum effort required of the *State* official is the consultation of databases maintained by *Federal* offices. 18 U.S.C. §922(s)(2).).

If the CLEO finds no bar to the purchase, the statute commands him to destroy the form and any references to it within twenty business days. 18 U.S.C. §922(s)(6)(B). If he finds a bar, he must so inform the Federally-licensed dealer and, if the purchaser requests, provide a written justification of his findings. 18 U.S.C. §922(s)(6)(C). Should the CLEO err in barring a purchase, the statute creates a Federal cause of action against his jurisdiction for correction and recovery of attorneys' fees. 18 U.S.C. §925A.

---

[3] Earlier bills had sought to provide opportunity for a State background check, rather than to mandate it. The proponents of the legislation in the 103d Congress, in contrast, stressed the mandatory nature of background checks as a virtue of their proposal. *See* H.R. Rep. No. 103-344, at 7 (1993); 139 Cong. Rec. H9091, H9094-95, H9107 (Daily ed., Nov. 10, 1993).

The 1993 statute thus shifts the primary burden of enforcing the Federal system onto State officials, requiring them to consult Federal records to determine whether each sale by a Federally-licensed dealer meets Federal standards. Pursuant to its requirements, the Attorney General of the United States issued Order No.1853-94, ordering State CLEOs to consult two Federal databases. 59 Federal Register 9498 (Feb. 28, 1994). State officials were thus required to check Federal forms, submitted by Federally-licensed dealers, against Federal databases and Federal law.

Petitioner Richard Mack is Sheriff and thus CLEO of Graham County, Arizona. As Sheriff, he is responsible for maintaining the peace of its 28,000 residents. App. 63. Even prior to enactment of the statute at issue, his force of twelve sworn officers was able to average but 1.5 officers on patrol at any given time, to cover a 4,500 square mile jurisdiction. *Id.*

Under the new Federal mandate, Petitioner was obliged to attempt to verify that each handgun sold by the county's 35 licensed dealers was in fact transferred to a lawful purchaser. The work consumed one to two man-hours of effort per day. App. 65. In the first three months, Petitioner processed over eighty purchase forms, of which exactly one proved questionable. *Id.* The mandated labor earned Petitioner the anger of his constituents, who held him accountable for diversion of his law enforcement resources. App. 66.

In February, 1993, Petitioner commenced an action in the United States District Court, District of Arizona, invoking its jurisdiction under 28 U.S.C. §1331. He sought

declaratory relief establishing, *inter alia*, that 18 U.S.C. §922(s) exceeds Congress' Article I powers and is inconsistent with the Tenth Amendment, and an injunction against its enforcement.

The District Court (Roll, J.), relying upon this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), entered final judgment striking those parts of 18 U.S.C. §922(s) which purport to impose duties upon State officials and upheld the remainder of the statute as severable. App. 26.

A divided Court of Appeals reversed the judgment of the District Court striking portions of the statute. The majority disposed of the Commerce Clause issue with a brief note that the statute regulates commerce. App. 5. It dealt with the Tenth Amendment concern by concluding that *New York* does not bar mandates to State officials to enforce, as opposed to enact, Federal programs:

> The Brady Act is not the kind of a federal mandate condemned by *New York*, nor does it present the concerns related above. . . . It is true that, for a limited period of time, the Act requires state law enforcement officials, the CLEOs, to make reasonable efforts to assist in carrying out the federal program. But the CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. . . . Instead, they are directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program.

App. 12-13. In dissent, Judge Fernandez argued that the enact/enforce distinction was inconsistent with the teaching of *New York*. "This case makes palpable the notion that the states are just a part of the national government, a notion that was rejected when this country was founded." Judge Fernandez added that, if an enact/enforce distinction could be drawn, the latter would be the greater, not the lesser, infringement of federalism:

> Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program.

App. 21.

REASONS FOR GRANTING THE WRIT

I

The Ninth Circuit's Decision Broadens The Commerce Power In A Manner Which Conflicts With The Rulings Of This Court And Of Other Circuits

The Framers believed that liberty was best preserved by dividing the responsibilities of power among jealous rivals – executive and legislative, State and Federal. To protect the role of the States, the Framers gave the national government powers that were "few and defined," *Federalist No. 45* (J. Madison), a limitation

underscored by the later ratification of the Tenth Amendment.

Among those defined powers was authority "to regulate commerce . . . among the several States." Art. I, §8. As the nation has grown, so has this power. But in 1993 Congress chose to regulate, not commerce, but the States themselves. It issued commands to their officials, not on the basis that they were engaging in or regulating commerce, but on the basis that they were declining to do so.

For two centuries, it has been the understanding of all – Congress, President, and courts – that the Commerce Clause does not authorize Congress to command the States to regulate commerce. Two decades have passed since the Courts of Appeals overwhelming rejected, and the United States declined to defend, attempts to command State enforcement of Federal regulation of commerce. That chain of cases began when the EPA "vetoed" certain State attempts at Clean Air Act compliance and imposed Federal standards. Rather than use Federal resources to enforce its standards, EPA asserted the statutory power to force State agencies to apply them.

The Fourth, Ninth, and District of Columbia Circuits held that such a construction would exceed the Commerce Clause and Tenth Amendment restrictions, and repudiated the asserted power. *See State of Maryland v. EPA*, 530 F.2d 215, 227-28 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 837-39 (9th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975) ("We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing nonconsenting states to regulate

activities affecting interstate commerce, and we doubt that any exist.").[4]

After this Court granted certiorari, the Solicitor General declined to defend the regulations, *see* Brief for the Federal Parties, *EPA v. Brown* (No. 75-909) at 20 n.14, and this Court acted upon the concession. *EPA v. Brown*, 431 U.S. 99 (1977).

The issue, indefensible in 1977, now reappears. It is presented, paradoxically, in the wake of this Court's recent reiteration that:

> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating State regulation. The Constitution established Congress as a 'superintending authority over the reciprocal trade' among the States, The Federalist No. 42, p. 268 (C. Rossiter, ed. 1961) by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to State governments.

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[4] It is noteworthy that all Federal commands to the States upheld to date involved either commercial activity by the State itself, *see, e.g., Garcia v. San Antonio Metropolitan Transit Auth.*, 469 F.2d 528 (1985) (payment of wages); *South Carolina v. Baker*, 485 U.S. 505 (1988) (issuance of bonds) or enumerated non-commerce powers. *See Puerto Rico v. Branstad*, 483 U.S. 219 (1987) (Extradition Clause); *cf. Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3501 (1996) (Elections Clause).

New York v. United States, 505 U.S. at 166; *see also United States v. Lopez*, 115 S.Ct. 1624, 1626 (1995) (invalidating statute which neither regulated commerce nor required a connection to commerce).

Petitioner's position was simple: while firearms may flow in interstate commerce, he is not a firearms dealer, but a State official exercising police powers given him by the people of Arizona. (Appellee's Brief, 16-17; Reply Brief, 3; App. 22, 43). He neither engages in nor interferes with interstate commerce when he declines to review firearm purchase forms. If anything, he is *refusing* to affect commerce, and Congress is attempting to *force* him to do so.

The Ninth Circuit here disposed of the Commerce Clause issue with the note that regulation of firearm sales lies within the commerce power, and the statute in question focuses on sale rather than simple possession. App. 5. The fact that *others* in a State engage in commerce is thus made dispositive of the Congressional power to command State officials.

This treatment places the Ninth Circuit in conflict with *New York* and *Lopez*, not to mention Circuit rulings in *State of Maryland*, *Brown*, and *Train*.[5] If it is good law, then

---

[5] The Ninth Circuit attempts to distinguish *Brown* on the claim that the EPA there sought to compel State adoption of regulations. App. 15. In fact, the State regulations involved in these cases had been "vetoed," and Federal regulations imposed. The issue was posed even more clearly on remand, when the Administrator disavowed all intent of forcing State rulemaking, and the court specifically rejected the power to require State enforcement of Federal regulations. *Brown v. EPA*, 566 F.2d 665 (9th Cir. 1977).

New York cannot be: nuclear waste travels in and affects commerce, and Congress would have every right to command States to deal with it.

The Ninth Circuit decision, in sum, extends the Commerce Clause to the point where it abrogates the core principles of federalism itself. If the national sovereign can use the plenary power of the Commerce Clause to *force* State officials to control commerce as it sees fit, then indeed States are no more than regional offices of the national government – and unpaid ones at that.

II

The Decision Of The Ninth Circuit Improperly Narrows The Scope Of The Tenth Amendment As Recognized In *New York v. United States*.

The United States has repeatedly argued before this Court that mandated State enforcement of Federal policy would pose the quintessential Tenth Amendment violation:

> Under this Court's decision in *New York v. United States, supra*, very different constitutional issues would be presented if Congress imposed statutory requirements or prohibitions directly upon state and local educational officials, or if Congress mandated that state and local governments assume responsibility for the enforcement of federal law.

Reply Brief for the United States, *United States v. Lopez* (No. 93-1260) at 10.[6] By virtue of a reversal of Respondent's Tenth Amendment position, these "very different constitutional issues" are now squarely posed.

This Court has outlined in detail the parameters of Tenth Amendment federalism. While Congress can subject States to generally applicable regulations, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), or to special regulation *if* it offers valid alternatives, *FERC v. Mississippi*, 456 U.S. 742 (1982) (option of abstaining from regulating commerce); *Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc.*, 452 U.S. 264 (1981) (option of Federal pre-emption), or can (pursuant to the Supremacy Clause) require State adjudicators to apply Federal law, *Testa v. Katt*, 330 U.S. 386 (1947),[7] it *cannot* unconditionally commandeer State resources for its own ends. *New York v. United States*.

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[6] *See also* Brief of the United States, *New York v. United States*, at 37 (distinguishing statute from hypothetical measures requiring "implementation of federal policies regulating private conduct, which would transform State administrative bodies into 'field offices of the national bureaucracy.' ").

[7] *Testa* invalidated a State bar to enforcement of certain Federal claims in State courts of general jurisdiction. The rationale was simple: courts of general jurisdiction by definition rule upon all legal issues brought before them, and a constitutional Federal statute is entitled to supremacy. The filing of Federal claims in State court was the rule in the early republic; the State duty to hear them was recognized as early as *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). "No such historical tradition supports federal compulsion of a state's executive or legislative branches." D. Merritt, *The Guarantee Clause and State Autonomy*, 88 Col. L. Rev. 1, 66 n.369 (1988).

New York sets forth this Court's understanding of the Tenth Amendment. There, the Low-Level Radioactive Waste Policy Act gave States two alternatives: enter into specified interstate compacts (a legislative act) or take title to waste upon tender (a ministerial act at most). This Court concluded that *neither* alternative met Tenth Amendment muster.

The Court's rejection of the "take title" alternative is inconsistent with the Ninth Circuit's discovery that federalism protects only narrowly-defined legislative powers of the States:

> On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would be in principle no different from a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring state governments to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the states to assume the liabilities of certain state residents. Either type of federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments.

505 U.S. at 175. The breadth of *New York's* holding was underscored by this Court's use of the disjunctive: "Whatever the outer limits of [State] sovereignty may be,

one thing is clear: the federal government may not compel the states to enact *or* administer a federal regulatory program." *Id.* at 188 (emphasis supplied).

This understanding is shared by *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993). There the circuit considered the constitutionality of the Forest Resources Conservation Act, 16 U.S.C. §§620-620j. That statute essentially banned export of timber harvested on State lands, and required governors to issue implementing regulations. The panel held the disputed portion of the statute void under *New York*. To the government's contention that "Washington can avoid the Act altogether by simply halting all sales of timber," the circuit responded that this "is a choice similar to the one declared unconstitutional in *New York*, as it presents an alternative, halting all timber sales, that Congress has no authority to command." 992 F.2d at 947.[8]

The Ninth Circuit's decision here flies in the face of this precedent. It places a gloss on this *New York*'s use of "or administer," concluding that this Court must have meant only " 'administer' in the sense of being in charge of a program and making policy decisions. . . . " App. 11,

---

[8] The government had contended: "The Counties' Tenth Amendment claim fails first because Washington can remove itself from the reach of Section 491 entirely by halting sales of timber from the State's public lands. . . . In fact, the alternative open to Washington here would appear to be far less onerous than the alternative that eliminated the question of commandeering in *FERC*." It went on to contend that the State could still derive value from the resource, simply by selling timber lands rather than harvesting the timber itself. Brief for the Appellees, at 42-43.

n.7. The interpolation is inconsistent with the holding of *New York*, which invalidated *both* compelled compacts *and* mandated acceptance of title, and with the result in *Board of Natural Resources v. Brown*. The Tenth Amendment protects from Federal appropriation a State's resources – its treasury, timber, and manpower – not merely its policy decisions.

If the Circuit's newfound explanation of federalism is flawed, its application shrinks the Tenth Amendment to a Cartesian point, an abstraction with location but no dimensions. Although Petitioner is required to reallocate scarce resources given him by the voters, to exercise judgment as to how much effort is "reasonable," to guess as to whether to withhold permission where records are incomplete, and to take the blame (and civil liability created by the statute) for erroneous determinations, the Circuit suggests that he is not forced to " 'administer' in the sense of being in charge of a program." App. 11.[9] Although his constituents have in actuality blamed him for his involuntary role, the holding finds no accountability problem since with a better grasp of the law they would not do so. App. 12 n.8.[10]

---

[9] If CLEOs are not in charge of the statutory "program," one is left to wonder just who is. The CLEOs set the standards, conduct the reviews, allow or stop the transfer, set out the justification for denials, and are subject to suit if they err.

[10] Professor Merritt suggests the statute at issue poses no fewer than three misplaced accountability problems. First, State officials will be blamed for shortfalls if resources are diverted to the Federal objective; if Petitioner's office cannot respond to a crime in progress, or patrol strength is thinned, he and not Congress will be held accountable. Second, constituents may

The conflict between the Ninth Circuit and *New York* is absolute. If the Ninth Circuit is correct, then *New York* is wrong: the Federal government *could have* ordered State officials to take title to the waste and build appropriate disposal sites. Indeed, the national sovereign could have commanded them to reallocate their resources in any way it desired. There could have been no problem with misplaced accountability, since all requirements were imposed by Federal law. An identical conflict exists with the circuit disposition of *Board of Natural Resources v. Brown*, holding that the Federal government could not bar sale of State resources.

The Circuit decision reduces to a simple proposition: the national government may not make States its regional offices, for regional offices have discretion, but it may make them its messengers and file clerks. Principles of federalism are violated only if States are left with some discretion, not if they are bypassed and blind obedience is demanded of their servants. This strange understanding of dual sovereignty opens the door to national legislators, naturally desirous of claiming credit for action and yet of avoiding blame for its costs, to claim credit

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blame the State official for the underlying law; this has already happened to Petitioner. Third, constituents denied privileges by the adjudications forced upon State officials will blame the officials for a supposedly incorrect decision. This, too, has already been Petitioner's lot. D. Merritt, *Three Faces of Federalism*, 47 Vand. L. Rev. 1563, 1580 n.65 (1994). *See* App. 65-66.

for programs created yet shift the entire cost of operation to the State official of their choice.[11]

From the distance of two centuries, the novelty of the Framers' creation is easily overlooked. In creating a federal structure, they disregarded the first concept of contemporary political science – that there could be no *imperium in imperio*, no supreme ruling power within a supreme ruling power – and substituted a concept whereby *imperium* remained with the people, who apportioned it between two different sovereigns. *See generally* B. Bailyn, The Ideological Origins of the American Revolution 198-229 (1967). The Framers took comfort in the reflection that "Power is almost always the rival of power." *Federalist No. 28* (A. Hamilton). Rather than fearing the inefficiency of divided power, they rejoiced that

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the

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[11] Tenth Amendment analysis indeed understates the impact of this statutory innovation upon the Constitutional scheme. The President, charged with "tak[ing] care that the laws be faithfully executed" Art. II, §3, and with appointing "inferior officers" for that duty, Art. II, §2 is no longer empowered or accountable: Congress simply conscripts non-federal employees for the duty. The strictures of *Buckley v. Valeo*, 424 U.S. 1, 132-36 (1976) and *Bowsher v. Synar*, 478 U.S. 714 (1986) are thus sidestepped. The national government's taxing and spending powers, Art. I, §8, subject to the requirement of appropriation and published budget, Art. I §9, are likewise evaded by conscription of another sovereign's resources. The people of the States retain a republican form of government , Art. IV, §4, only to the doubtful extent that a republic can be said to exist where the people cannot fix the duties and powers of those they elect and the uses of the resources they appropriate.

> portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Federalist No. 51 (J. Madison). These practical judgments have withstood the hard test of two centuries. They are set at nought by the Ninth Circuit's construction of the Tenth Amendment.

We respectfully suggest that the Circuit's view of that amendment marks a complete abandonment of the teachings of *New York*, conflicts with *Board of Natural Resources*, and marks an abrogation of the core principles of federalism.

CONCLUSION

For the foregoing reasons we respectfully submit that the Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

DAVID T. HARDY
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed September 8, 1995]

Nos. 94-16940/94-17002

D.C. No. CV-94-00113-JMR

RICHARD MACK, Sheriff of Graham County, Arizona,

Plaintiff-Appellee-Cross-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the District of Arizona John M. Roll, District Judge.

Argued and Submitted

July 11, 1995 – San Francisco, California

OPINION

[Filed September 8, 1995]

Before: Herbert Y.C. Choy, William C. Canby, Jr., and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Canby; Partial Concurrence and Partial Dissent by Judge Fernandez

Opinion

CANBY, Circuit Judge:

Sheriffs Richard Mack and Jay Printz, in separate actions, challenged the constitutionality of the Brady Handgun Control Act, P.L. 103-159, 107 Stat. 1536 (1993), codified at 18 U.S.C. § 922(s). The main issue on appeal concerns the district courts' respective holdings that section 922(s)(2) of the Brady Act, requiring local law enforcement officials to perform background checks of handgun purchasers, violates the Tenth Amendment. We conclude that the Act is constitutional, and we accordingly reverse the judgments of the district courts.

FACTS

The Brady Act, passed in 1993 as an amendment to the Gun Control Act of 1968, imposes a waiting period of up to five days for the purchase of a handgun, and subjects purchasers to a background check during that period.[1] See 18 U.S.C. § 922(s)(1). Within five years from the effective date of the Act, such checks will be performed instantaneously through a national criminal background check system maintained by the Department of Justice, 18 U.S.C. § 922(t), but in the meantime the background checks must be performed by the Chief Law Enforcement Officer (CLEO) of the prospective purchaser's place of residence. 18 U.S.C. § 922(s)(2). The Act

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[1] The waiting period and background check prescribed by the Act are not required in States that have permit systems meeting standards prescribed by the Act. 18 U.S.C. § 922(s)(1)(C), (D).

requires CLEOs to "make a reasonable effort to ascertain . . . whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law. . . ." Id. The CLEO performs the check on the basis of a sworn statement signed by the buyer and provided to the CLEO by a federally-licensed gun dealer. 18 U.S.C. § 922(s)(1)(A). If the CLEO approves the transfer, he or she must destroy the buyer's statement within twenty business days after the statement was made. 18 U.S.C. § 922(s)(6)(B)(i). If the CLEO disapproves the transfer, the CLEO must provide the reasons for the determination within twenty business days if so requested by the disappointed purchaser. 18 U.S.C. § 922(s)(6)(C).

Richard Mack and Jay Printz, as sheriffs, are the CLEOs in their respective jurisdictions of Graham County, Arizona, and Ravalli County, Montana. They brought these actions in their local federal district courts to challenge the Brady Act's provisions imposing duties upon them. Mack and Printz both invoked the Tenth and Fifth Amendments. Mack also challenged the Act as violating the Thirteenth Amendment.

Both district courts held that section 922(s)(2) of the Act, by imposing on the sheriffs a mandatory duty to conduct background checks, violated the Tenth Amendment as interpreted by the Supreme Court in *United States v. New York*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). See *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D.

Mont. 1994).[2] Neither court enjoined the provisions of the Act requiring CLEOs to explain the reasons for rejecting a purchase application, § 922(s)(6)(C), and requiring destruction of records, § 922(s)(6)(B). The *Printz* decision noted that the requirement of a statement of reasons became optional once the mandatory background check was invalidated, and that the provision for destruction of records was "de minimis."

In *Mack*, the district court also held that the criminal provisions of the Act applied to CLEOs, and were void for vagueness under the Fifth Amendment because they made it a crime for CLEOs to fail to make a "reasonable effort" to ascertain the lawfulness of a prospective handgun purchase. The *Printz* court held that the criminal provisions did not apply to CLEOs. Finally, the *Mack* court rejected Mack's Thirteenth Amendment challenge. Both district courts held that the invalid portions of the Act were severable, and accordingly refused to hold the entire Act unconstitutional.

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[2] Four other district courts have ruled on whether the interim provisions of the Brady Act violates the Tenth Amendment. *See Romero v. United States*, 883 F. Supp. 1076 (D. La. 1995) (provisions of Brady Act requiring CLEOs to perform background checks, destroy sworn statements, and provide written response to those denied a handgun, held unconstitutional); *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994) (provision of Brady Act requiring CLEOs to perform background checks unconstitutional); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994) (same); *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994) (interim provisions not unconstitutional).

In both actions, both sides appealed.[3] The sheriffs primarily dispute the holdings of severability, while the United States contends that the entire Act is constitutional.[4]

ANALYSIS

I. THE TENTH AMENDMENT CHALLENGE

No one in this case questions the fact that regulation of the sales of handguns lies within the broad commerce power of Congress.[5] The issue for decision is whether the manner in which Congress has chosen to regulate in the Brady Act violates the Tenth Amendment.

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[3] Handgun Control, Inc., et al., Senator Paul Simon, and the State of Ohio, have filed briefs as amici curiae in support of the United States. The Law Enforcement Alliance of America filed an amicus curiae brief in support of Mack.

[4] The United States also argues that, if the disputed provisions are unconstitutional, the injunction should prevent enforcement only against the two sheriffs because they did not bring class actions. Our disposition of the appeal makes it unnecessary for us to address this contention.

[5] Nor is any question raised by the Supreme Court's recent decision in *United States v. Lopez*, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), holding that Congress lacked authority under the commerce clause to enact the Gun Free School Zones Act. Unlike the statute in *Lopez*, the Brady Act regulates the *sale* of handguns and thus directly regulates commerce. The Brady Act is an amendment to a comprehensive federal scheme for the regulation of firearms sales that unquestionably affect interstate commerce. The legislative history of the Brady Act also contains findings that gun violence affects commerce, and we accept those findings. *See* H.R. Rep. 103-344, 103rd Cong., 1st Sess., *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. Const. amend. X. As a textual matter, therefore, the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124, 85 L. Ed. 609, 61 S. Ct. 451 (1941). By its terms, the Amendment does not purport to limit the commerce power or any other enumerated power of Congress.

In recent years, however, the Tenth Amendment has been interpreted "to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." *South Carolina v. Baker*, 485 U.S. 505, 511 n.5, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988). Thus, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). The question before us is whether the Brady Act, by requiring CLEOs to perform background checks on handgun purchasers, transgressed such an implied limitation on federal power. We conclude that it did not.

There are numbers of ways in which the federal government is permitted to secure the assistance of state authorities in achieving federal legislative goals. First and most directly, the federal government may coerce the states and their employees into complying with federal

laws of general applicability. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985).[6] Second, Congress may condition the grant of federal funds on the States' taking governmental action desired by Congress. *South Dakota v. Dole*, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987).

These broad categories do not exhaust, however, the means by which the federal government can enlist state employees in implementing federal programs. State judicial and administrative bodies may be required to apply federal law. *Testa v. Katt*, 330 U.S. 386, 91 L. Ed. 967, 67 S. Ct. 810 (1947); *FERC v. Mississippi*, 456 U.S. 742, 760-61, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982). The federal government may offer to preempt regulation in a given area, and permit the states to avoid preemption if they regulate in a manner acceptable to Congress. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-91, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).

The federal government has been permitted effectively to compel the states to issue registered rather than bearer bonds. *South Carolina v. Baker*, 485 U.S. 505, 514, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988). Finally, the federal government has been permitted to require state utility regulators to consider prescribed federal standards in determining regulatory policies. *FERC v. Mississippi*, 456 U.S. at 765. In the course of the latter ruling, the Supreme

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[6] It is true that this principle was rejected for certain state functions in *National League of Cities v. Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), but *National League of Cities* was expressly overruled in *Garcia*, 469 U.S. at 557, and *Garcia* remains the law controlling us.

Court referred to and rejected the "19th century view" that "Congress has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." *Id.* at 761 (quoting *Kentucky v. Dennison*, 65 U.S. 66, 24 How. 66, 107, 16 L. Ed. 717 (1861)). That view, said the Court, "is not representative of the law today." *Id.* "The federal government has some power to enlist a branch of state government . . . to further federal ends." 456 U.S. at 762.

Against this background, there would appear to be nothing unusually jarring to our system of federalism in the Brady Act's requirement that CLEOs, during a five-year interim period, "make a reasonable effort to ascertain" the lawfulness of handgun purchases. The obligation imposed on state officers by the Brady Act is no more remarkable than, say, the federally-imposed duties of state officers to report missing children, 42 U.S.C. § 5779(a), or traffic fatalities, 23 U.S.C. § 402(a).

Mack and Printz, however, contend that the precedential background set forth above was changed by *United States v. New York*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), and that the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program. We do not read *New York* that broadly.

Although we concede that there is language in *New York* that lends support to the view of Mack and Printz, that language must be interpreted in the context in which it was offered. *New York* was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act.

The constitutional evil that *New York* addressed was one recognized by several of the cases already cited: the federal government was attempting to direct the States to enact their own legislation or regulations according to a federal formula.

New York involved the constitutional validity of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b et. seq. The part of the Act that the Court found to violate the Tenth Amendment was the so-called "take title" provision. Under that provision, a State that failed to regulate radioactive waste according to congressional standards was simply given title to the waste within its borders (which previously would have been in private hands). The waste then became the total responsibility of the State as owner. The alternative to this unacceptable prospect was for the State to legislate or regulate in a manner that Congress dictated, and "a direct order to regulate, standing alone, would . . . be beyond the power of Congress." *Id.* at 176. Thus, in response to the government's argument that a strong federal interest supported the "take title" provision, the Court in *New York* stated: "whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation." *Id.* at 178. In the same vein was the Court's conclusion after reviewing the debates at the time of the founding of the Constitution:

> We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain

> acts, it lacks the power directly to compel the States to require or prohibit those acts. E.g., *FERC v. Mississippi*. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Id. at 166.

Other decisions of the Supreme Court have recognized this proposition that the federal government cannot coerce States into performing the ultimately sovereign acts of legislating or regulating in a manner specified by the federal government. In *Virginia Surface Mining*, the Court noted that the provision of an alternative of federal regulation rendered federal standards for state regulation permissible; because the State had a constitutional option, "there can be no suggestion that the Act commandeers the legislative processes by directly compelling them to *enact and enforce* a federal regulatory program." *Virginia Surface Mining*, 452 U.S. at 288 (emphasis added). Similarly, In *FERC v. Mississippi*, the Court noted that the federal command that the State "consider" federal alternatives was constitutional because "[t]here is nothing in PURPA 'directly compelling' the States to enact a legislative program." *FERC v. Mississippi*, 456 U.S. at 765.

New York, then, is best read as a case that draws a line already partly delineated in *Virginia Surface Mining* and *FERC v. Mississippi*: the federal government is not entitled to coerce the States into legislating or regulating according to the dictates of the federal government. Certainly *New York* did not purport to overrule *Virginia Surface*

Mining or *FERC v. Mississippi*, or even to disavow the latter decision's rejection of the nineteenth century view that the federal government cannot command state employees. *New York* can be read consistently with these cases as an instance where "the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf. *New York*." *United States v. Lopez*, 131 L. Ed. 2d 626, 115 S. Ct. 1624, 1642 (1995) (Kennedy, J., concurring); *see also Board of Natural Resources v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993) ("direct commands to the states to regulate according to Congress's instructions" "violate the Tenth Amendment as interpreted by *New York*").[7]

There are good reasons for focusing Tenth Amendment concern on federal coercion of a State's enactment of legislation or regulations or creation of an administrative program. These activities are inherently central acts of a sovereign; if an area of state activity is to be protected from direct coercion by an implication drawn from the Tenth Amendment, legislating and regulating are prime candidates. "[T]he power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. at 761. There is a second reason, also, emphasized in *New York* itself. Democratic governments must be politically accountable. When the

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[7] Thus we conclude that when the Court in *New York* stated that "[t]he Federal Government may not compel States to enact or *administer* a federal regulatory program," the Court meant "administer" in the sense of being in charge of a program and making policy decisions with respect to the program. *New York*, 505 U.S. at 188.

federal government requires the States to enact legislation, the enacted legislation is *state* legislation. Thus, it will likely "be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 169. When the federal government itself imposes a requirement on a state official, the requirement is more clearly an act of the federal government and thus does not, to the same extent, undermine political accountability.[8]

The Brady Act is not the kind of a federal mandate condemned by *New York*, nor does it present the concerns related above. The Brady Act does not embody a mandate to the "States" in the sovereign sense discussed in *New York*, *FERC v. Mississippi*, or *Virginia Surface Mining*. The Brady Act is a regulatory program aimed at individuals and not the States. It is true that, for a limited period of time, the Act requires state law enforcement officials, the CLEOs, to make reasonable efforts to assist in carrying out the federal program. But the CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. They are not even being asked to produce a state policy, for which the state must bear political accountability. Instead, they are

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[8] We recognize that some individuals may criticize local officials for implementing federal regulations. But when federal regulations are imposed by the federal government, political accountability by the federal government for those regulations remains.

directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program. Their activities are not alien to their usual line of work, and represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials.

Mack and Printz do not agree that the Brady Act's interference with their state duties is minimal. They point out that there are many factors that may make a prospective handgun purchase illegal under the Act. A purchase is unlawful, for example, if the purchaser is a fugitive, is an unlawful user of a controlled substance, has been adjudicated a mental defective, has been dishonorably discharged from the armed forces, has renounced his citizenship, or is under certain restraining orders involving an intimate partner. 18 U.S.C. § 922(g). They also contend that it will be unduly burdensome to give reasons for rejecting a proposed purchase, within 20 days of being requested by the disappointed purchaser. *See* § 922(s)(6)(C). Mack and Printz point out that they are sheriffs in rural counties with limited staffs and resources. To research for all of these disabilities and to give reasons for rejection, Mack and Printz argue, will either take all of their time or so much of it that they will be unable to perform their regular county duties.

The government, on the other hand, argues that there is no requirement that CLEOs pursue all of these avenues of potential disqualification. They are enjoined only to "make a reasonable effort," § 922(s)(2), and the statute's only fixed requirement is a search in whatever recordkeeping systems are available and in a national

system. *Id.* A reasonable effort, the government contends, might in the circumstances of Mack and Printz simply be a check of the existing computer records.

We agree, and the government concedes, that there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment. Surely the federal government cannot stall the state government in its tracks by imposing all-consuming federal duties on the State's employees. We conclude, however, that the Brady Act does not approach that point. Mack and Printz have not demonstrated that the Act will interfere unduly with their duties. Indeed, to a considerable degree, the dispute over the magnitude of the burden imposed upon them is not ripe for resolution. Mack and Printz have not been subjected to any interpretation of the Act, or any attempt to enforce it against them, that requires them to do more than check computer records. On this record, we cannot conclude that "a reasonable effort" inevitably requires more than this minimum for Mack and Printz. To perform such computer checks, and to explain reasons for rejection when and if disappointed purchasers so request, has not been shown to constitute the kind of interference with state functions that would raise Tenth Amendment concerns. It follows even more strongly that the minimal requirement of destruction of records presents no constitutional problem.

We also find no support for the Tenth Amendment claims of Mack and Printz in the cases from our circuit that they cite. *See Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978); *Brown v. Environmental Protection Agency*,

521 F.2d 827 (9th Cir. 1975), *vacated as moot* 431 U.S. 99 (1977).[9] In *Board of Natural Resources* we held that the Forest Resources Conservation and Shortage Relief Act violated the Tenth Amendment. *Board of Natural Resources*, 992 F.2d at 947. That Act however – akin to the statute in *New York* – required the States to issue regulations and was far more demanding of state officials than the Brady Act. *See Board of Natural Resources*, 992 F.2d at 947. *Best* applied the National League of Cities governmental function test, *Best*, 573 F.2d at 1102, which has been abandoned. *See Garcia Metropolitan Transit Authority*, 469 U.S. at 531 (overruling *National League of Cities*). And *Brown*, like *Board of Natural Resources*, involved regulations that clearly intruded upon a state's sovereignty, unlike the contested provisions of the Brady Act. *See Brown*, 521 F.2d at 829-830 (State had to develop and implement plan for implementing, enforcing, and maintaining national air standards). Additionally, *Brown* relied upon the Tenth Amendment view espoused in *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107, 16 L. Ed. 717 (1861), *overruled by Puerto Rico v. Branstad*, 483 U.S. 219, 97 L. Ed. 2d 187, 107 S. Ct. 2802 (1987), that "the Federal Government . . . has no power to impose on a State officer, as such, any duty whatsoever. . . . " *See Brown*, 521 F.2d at 841. As the Supreme Court has made clear, the view

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[9] Although the Supreme Court vacated *Brown*, on remand we stated: "Except as modified herein, we continue to regard, or once more adopt if necessary, our opinion in *Brown I* as the law of this circuit." *Brown v. EPA*, 566 F.2d 665, 666 (9th Cir. 1977). For reasons discussed later in the text, however, the precedential value of *Brown* is limited.

espoused in *Kentucky v. Dennison* is no longer representative of the law. *FERC*, 456 U.S. at 761.[10] We therefore reject Mack's and Printz's Tenth Amendment challenges to the Brady Act.[11]

II. THE FIFTH AMENDMENT VAGUENESS CHALLENGE

Section 924(a)(5) of the Act provides that "[w]hoever knowingly violates subsection (s)" of the Act is subject to fine or imprisonment or both. Mack and Printz contend that this provision subjects them to criminal liability for

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[10] The Law Enforcement Alliance of America, as Amicus Curiae, argues that the method by which the Brady Act was enacted violates the "structuralist" test articulated by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), under which the States are protected from overreaching by the federal government primarily by "the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." *Id.* at 552. The Court in *New York* has indicated that *Garcia* is limited to statutes that subject "a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160. But even if we assume that Garcia's structuralist test were applicable, we cannot accept the Law Enforcement Alliance's view that the Brady Act would fail the test. There is no showing that the States affected were "deprived of any right to participate in the national political process" or were "singled out in a way that left [them] politically isolated and powerless." *South Carolina v. Baker*, 485 U.S. at 513.

[11] Because we hold that the Brady Act does not violate the Tenth Amendment, we do not consider whether section 922(s)(2) is severable from the remainder of the Act, or whether the district courts erred in issuing injunctions that applied statewide.

failing to "make a reasonable effort" to ascertain whether a particular purchase would violate the law, as required by section 922(s)(2). So construed, the criminal provision is unconstitutionally vague, according to Mack and Printz, because a person of reasonable intelligence has no way of knowing what may constitute a "reasonable effort."

It is not at all clear, however, that section 924(a)(5) is intended to apply to the Act's requirements imposed upon CLEOs. Indeed, the Montana district court viewed the criminal prohibition as ambiguous in that regard, and concluded that it did not apply to CLEOs.

We decline to reach this issue, however, because it is not ripe.[12] Mack and Printz have not been charged under the Act with any criminal violations, nor are they likely to be. The United States represented during oral argument that the Justice Department's official position is that the criminal sanctions of the Brady Act do not apply to CLEOs. Because Mack and Printz do not face a "credible threat of prosecution," *San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 821 (9th Cir. 1987), aff'd 489 U.S. 214, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989), there is no "case or controversy." *See Campbell v. Wood*, 18 F.3d 662, 680 (9th Cir.), cert. denied, 114 S. Ct. 2125

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[12] Mack and Printz also make a vagueness argument based on their exposure to civil proceedings. Neither Mack nor Printz has been subjected to civil proceedings, nor have they pointed to any civil proceeding to which they would be subject that would violate the Fifth Amendment. In any event, because this issue was not raised below, we decline to reach it.

(1994).[13] In the extremely unlikely event that a criminal prosecution is one day brought against a CLEO, the constitutional objection may be raised in defense at that time.

We therefore vacate the ruling of the District Court of Arizona that the criminal provisions apply to CLEOs and are void for vagueness, as well as the ruling of the District Court of Montana that the criminal provisions do not apply to CLEOs. These claims are to be dismissed as unripe.

III. THE THIRTEENTH AMENDMENT CHALLENGE

Mack also challenges the Brady Act as violating the Thirteenth Amendment. The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII. According to Mack, section 922(s) requires him to perform labor for the United

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[13] Mack and Printz also suggest that they need not face a reasonable threat of prosecution. None of the cases that they cite support this proposition, however. *See Board of Natural Resources*, 992 F.2d at 945 (plaintiff showed injury in fact); *Epperson v. Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968) (Court did not reach the justiciability issue); *Beacon Journal Pub. Co. v. Unger*, 532 F. Supp. 55, 58 (N.D. Ohio 1982) (plaintiff showed injury in fact); *Brown v. EPA*, 521 F.2d at 831 & 829 n.1 (the EPA had already given a notice of violation.); *Gentile v. State Bar*, 501 U.S. 1030, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991) (plaintiff charged with violation); *Babbitt v. Farm Workers*, 442 U.S. 289, 299-300, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (even though plaintiffs did not face an imminent threat of prosecution, statute was "sure to work the injury alleged," and so Court found a case or controversy).

States or face legal sanctions, even though he is not a federal employee.

Unlike a slave, however, Mack can quit work at any time. By doing so, he escapes all compulsion. The requirements of the Brady Act are not placed on Mack personally; the duties that are imposed attend the office. Thus the Brady Act does not coerce Mack "by improper or wrongful conduct" into service by causing and intending to cause him "to believe that he . . . has no alternative but to perform the labor." *Brogan v. San Mateo County*, 901 F.2d 762, 764 (9th Cir. 1990) (citation omitted). The fact that *Mack*, if he continues to be sheriff, must perform certain duties as a condition of his employment, does not violate the Thirteenth Amendment. *Cf. United States v. 30.64 Acres of Land*, 795 F.2d 796, 800-01 (9th Cir. 1986) (requiring lawyers to perform pro bono services does not violate Thirteenth Amendment because requirement is a condition of practicing law).

CONCLUSION

The Brady Act violates neither the Tenth nor Thirteenth Amendment. Mack and Printz's Fifth Amendment vagueness challenge is not ripe. Accordingly, the district courts' injunctions prohibiting the United States from enforcing the disputed provisions of the Brady Act are vacated, and the district courts' judgments are reversed insofar as they invalidate portions of the Act. The portions of the cross-appeal in *Mack* and the appeal in *Printz* that challenge the district courts' rulings of severability are dismissed as moot; in all other respects the rulings challenged by Mack and Printz, are affirmed. The cases

are remanded with instructions to dismiss the vagueness challenges as unripe. The United States is entitled to its costs on appeal.

No. 94-16940 (Appeal by United States) **REVERSED**.

No. 94-17002 (Cross-appeal by Mack) **AFFIRMED** in part and **DISMISSED** in part.

No. 94-36193 (Appeal by Printz) **AFFIRMED** in part and **DISMISSED** in part.

No. 95-35037 (Cross-Appeal by United States) **REVERSED**.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts II and III of the majority opinion, but I respectfully dissent from part I.[1]

This case makes palpable the notion that the states are just a part of the national government, a notion that was rejected when this country was founded. Congress has previously attempted to order the states to legislate or regulate in particular ways, and it has failed at that. *See, e.g., New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992); *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993); *cf. United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978). That is to say, Congress has failed when it has not given the states the option to avoid the intended yoke. *See, e.g., FERC v. Mississippi*, 456 U.S. 742, 766, 102 S. Ct. 2126,

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[1] Given the majority's decision, I see no need to discuss the criminal provisions of this law, the severability of the law's provisions, or the breadth of the injunctions imposed by the district courts.

2141, 72 L. Ed. 2d 532 (1982); see also *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), vacated by 431 U.S. 99, 97 S. Ct. 1635, 52 L. Ed. 2d 166 (1977), *on remand* to 566 F.2d 665 (9th Cir. 1977). Even those determinations are not without their problems because government." *See FERC*, 456 U.S. at 782, 102 S. Ct. at 2150 (O'Connor, J., dissenting).

Now Congress has avoided those issues, but it has done so by eliminating the niceties of the federal-state relationship entirely. Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program. Those officials must make a "reasonable effort" to decide whether receipt of a weapon by a proposed transferee "would be in violation of the law" of the United States. 18 U.S.C. § 922(s)(2). Those efforts must include "research in whatever State and local recordkeeping systems are available *and* in a national system designated by the Attorney General." *Id.* (emphasis added). And the work must be done within five business days. Id. The officials must also dispose of the materials and may not make any use of them other than that directed by Congress. *Id.* § 922(s)(6)(B). They must provide written explanations for negative determinations upon request. *Id.* § 922(s)(6)(C). Presumably those officials must also adopt appropriate procedures for

the carrying out of those functions. Perhaps that is not forced administration of the federal gun regulation program, but I fail to see why it is not.

Of course, the states are to bear the full cost of these tasks, and, unless the states adopt a local permit system, they cannot opt out of the federal program. If a state does not choose to engage in the regulation of this part of commerce – commerce in weapons – that makes no difference at all. In other words, state officials are conscripted by the federal government to fulfill its purposes and they can do nothing about that.

The government argues that this is much more respectful of state sovereignty than the legislation struck down in *New York*. I do not agree. If the Tenth Amendment has anything to do with the separate sovereign dignity of the states, it is difficult to see how that dignity is not undermined by the reality of a command that they commit their resources to the carrying out of this kind of federal policy, whether they like it or not.

Moreover, we are not dealing with a situation where a state seeks to stay in the business of regulating commerce in weapons. Quite the contrary. This legislation impacts states that do not wish to do so. I assume that the Supreme Court meant what it said when it said:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several states a residuary and

> inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

New York, 505 U.S. at ___, 112 S. Ct. at 2434-35 (citations omitted).

This legislation is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they were mere federal employees. It makes every CLEO's office an office of the federal bureaucracy, funded by the states, but directed from Washington. The time to stop this journey of a thousand miles is at the first step.[2]

Therefore, I respectfully dissent from the majority's determination that the statute does not violate the Tenth Amendment.

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[2] *Cf.* Lao-tzu, Bartlett's Familiar Quotations 65, quotation 1, (1980).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed December 19, 1995]

Nos. 94-16940/94-17002

D.C. No. CV-94-00113-JMR

RICHARD MACK, Sheriff of Graham County, Arizona,

Plaintiff-Appellee-Cross-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant-Cross-Appellee.

JAY PRINTZ, Sheriff/Coroner, Ravalli County, Montana,

Plaintiff-Appellant-Cross-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee-Cross-Appellant.

BEFORE: CHOY, CANBY AND FERNANDEZ, CIRCUIT JUDGES.

The panel has voted unanimously to deny both petitions for rehearing.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matters en banc. F. R. App. P. 35.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Sheriff Richard Mack,

Plaintiff

vs. No. CV 94-113-TUC-JMR

United States of America,

Defendant.

ORDER & MEMORANDUM DECISION

[Entered June 28, 1994]

INTRODUCTION

Pending before the Court is plaintiff Graham County Sheriff Richard Mack's complaint for injunctive and declaratory relief against the enforcement of 18 U.S.C. 922(s), commonly referred to as the Brady Act. For the reasons set forth below, the Court finds that subsection 922(s)(2) violates the Fifth and Tenth Amendments of the United States Constitution and will enter partial judgment in favor of the plaintiff on that basis.

The Brady Act

This lawsuit is a challenge to the constitutionality of public law 103-159, 107 Stat. 1536 (1993), codified at 18 U.S.S. 922(s), which amends the Gun Control Act of 1968.[1] The statute, popularly known as the Brady Act,

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[1] Several other courts have had an opportunity to review this matter. See *Printz v. United States*, No. CV 94-35-M-CCL (D. Mont. 1994) (declared unconstitutional); *McGee v. United States*, No. 2:93-CV-67PS (SD Miss.) (declared unconstitutional but

provides for a waiting period of five business days for purchases of handguns from federally-licensed gun dealers. 18 U.S.C. 922(s)(1)(A)(ii). During the waiting period, the "chief law enforcement officer" (CLEO) in each jurisdiction is required to "make a reasonable effort to ascertain . . . whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. 922(s)(2). The CLEO is defined as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. 922(s)(8).

The CLEO performs the check on the basis of a sworn statement that the prospective purchaser provides to the gun dealer and that the gun dealer in turn provides to the CLEO. The CLEO must destroy the sworn statement within 20 days of the date of the transfer unless the CLEO determines that the transfer would violate the law. 18 U.S.C. 922(s)(6)(B). If the CLEO determines that the transfer would violate the law, the CLEO must, within 20 days of a request, provide reasons to the denied purchaser for that determination. 18 U.S.C 922(s)(6)(C).

The Brady Act also amends the penalty provision of the existing criminal code by providing that anyone who knowingly violates its provisions shall be subject to a fine, imprisonment, or both. 18 U.S.C. 924(a)(5). CLEOs are specifically exempted from civil liability. 18 U.S.C.

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injunctive relief limited to sole plaintiff); *Koog v. United States*, No. DR-94-Ca-8 (WD Tex. 1994) (constitutionality of Act upheld).

922(s)(7). It is the position of the Department of Justice that criminal sanctions shall not attach to any CLEO who violates any provision of the Brady Act. The Act does not so indicate, however.

The interim procedure outlined above is slated to be replaced by a national instant criminal background check system to be developed and maintained by the Department of Justice within five years from the date of enactment. 18 U.S.C. 922(t)(1). The national system will consist of a computerized database of information gathered from both federal and state criminal records and will be accessible telephonically by federally licensed gun dealers. Once the national data bank is operational, the duties of the CLEO will cease.

Plaintiff Richard Mack is the sheriff of Graham County. As such, he is the chief law enforcement officer of that jurisdiction. Graham County is a sparsely populated rural county of 4500 square miles inhabited by 28,000 residents. The Graham County Sheriff's Office is responsible for law enforcement in the county and consists of a staff of twelve officers, including the sheriff.

Mack has been advised by the Graham County Attorney that he is to enforce the provisions of the Brady Act until a court of competent jurisdiction rules otherwise. Mack alleges that the Brady Act will require him to search nine categories of records, those categories having varying degrees of accessibility. Mack maintains that his responsibilities under state law do not include conducting the type of investigations the Act mandates, and that

he does not have the personnel or funds to do so.[2] He claims that his refusal to perform the duties imposed upon him by the Brady Act would subject him to criminal penalties.

Plaintiff Mack seeks a declaration that 18 U.S.C. 922(s) is unconstitutional as beyond the powers delegated to Congress in Article 1, sec. 8 of the United States Constitution, contravenes the Tenth and Thirteenth Amendments, and is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. Mack asks the Court to enter a permanent injunction against enforcement of the Brady Act.

Upon suggestion of counsel, the Court previously agreed to consolidate Mack's motion for preliminary injunction with his complaint for permanent relief. Also before the Court is defendant United States of America's motion to dismiss, which the parties have agreed may be ruled upon as well. In essence, these procedural mechanisms permit the Court to reach the merits of the case at this time. For the reasons set forth below, the Court finds section 922(s)(2), the provision of the Brady Act that requires local law enforcement officials to conduct a reasonable background search, exceeds Congress's Article I powers in violation of the Tenth Amendment. Additionally, that provision, enforceable by way of criminal sanctions, is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. However,

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[2] In addition to his statutory duties, Sheriff Mack is bound to obey the laws of the United States by his oath of office.

the Court finds this offending provision to be severable from the balance of the Act.

DISCUSSION

Sheriff Mack's Standing to Sue

The first question posed by defendant United States of America is whether this plaintiff has standing to sue. The jurisdiction of the federal courts is limited by Article III, sec. 2 of the Constitution to adjudication of "cases or controversies." U.S.Const. art. III, sec. 2. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy the core constitutional requirements for standing, a plaintiff must demonstrate that he or she has suffered, or is in imminent danger of suffering, a distinct and palpable personal injury fairly traceable to the defendant's allegedly unlawful conduct and such injury is likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984). A citizen's belief that the government is violating the Constitution does not constitute sufficient personal injury to satisfy the Article III standing requirements. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2143-44 (1992).

In order to reach these claims, the Court must first determine whether the criminal penalty provisions of the Brady Act apply to Sheriff Mack. As recited above, the Brady Act amends the penalty provision of the existing criminal code by providing that "[w]hoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1000.00, imprisoned for not more than 1

year, or both." 18 U.S.C. 924(a)(5). Focusing on the word "whoever," the Court finds that Mack is unequivocally at risk of criminal sanctions should he decide to disobey the statute.

The United States disputes this interpretation and cites a Bureau of Alcohol Tobacco and Firearms "Open Letter" to state and local law enforcement officials explaining the operation of the Brady Act. The Bureau of Alcohol, Tobacco, and Firearms is the federal agency responsible for implementing the Act. The Bureau interprets the mandatory provisions of the Act as merely requiring "some minimal effort to check commonly available records." Moreover, the letter states that it will be left to the discretion of the CLEO to establish enforcement standards based upon the jurisdiction's resources which, depending on the area, could entirely negate the research obligation. The Assistant Attorney General for the Office of Legal Counsel has officially opined that the penalties section of the Act do not apply to chief law enforcement officers.

An agency's interpretation of a statute it administers is entitled to deference only when the statute is silent or ambiguous on the issue presented.[3] In determining whether Congress has expressed "an intention on the

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[3] As the Supreme Court has explained: "First, always, is the question whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . " *Chevron USA v. NRDC*, 467 U.S. 837, 842-43 (1984).

precise question at issue," this Court employs "traditional tools of statutory construction." *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 843 n. 9 (1984). In so doing, however, it should be emphasized that courts are the final authorities on issues of statutory construction. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987); *Natural Resources Defense Council, Inc. v. Hodel*, 819 F.2d 927, 929 (9th Cir. 1987). Moreover, it is "unclear whether an agency's interpretation of a criminal statute is entitled to deference under *Chevron*." *United States v. Douglas*, 974 F.2d 1046, 1048 n. 1 (1992) (emphasis in original).

It is basic that "as long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989). The relevant provision of the Brady Act imposes liability upon those who knowingly violate its terms.[4] Although the term "whoever" is not defined under the statute, it does not demand further articulation.[5]

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[4] Again, CLEOs are specifically exempted from civil liability. 18 U.S.C. 922(s)(7). It is apparent from this exemption that Congress considered the extent to which it wished to hold a CLEO responsible for enforcement. It is difficult to conclude that Congress meant to preclude criminal liability simply because civil liability has been removed.

[5] Assuming for the sake of argument that the term lacks clarity, several interlocking principles guide this Court's construction to the identical result. First, a statute must be construed, if fairly possible, to avoid constitutional problems. *Communication Workers of America v. Beck*, 487 U.S. 735, 762 (1988). If ambiguous, the more lenient construction in favor of a criminal defendant is required. *United States v. Bailey*, 982 F.2d

Under the plain meaning of the statute, Mack is under threat of criminal penalties and thus possesses an injury that can be redressed. The agency's interpretation to the contrary is entitled to no deference.[6]

The United States asks the Court to additionally consider whether Mack is entitled to bring suit in his official capacity, assuming that he can allege no injury as a private entity. See *Karcher v. May*, 484 U.S. 72, 78 (1987) (appellant state legislators who participated in lawsuit in their official capacities lacked standing to appeal on behalf of legislature when term of office expired); *Bender v. Williamsport Area School District*, 475 U.S. 534, 544 (1986) (plaintiff school board member had "no personal stake in the outcome of the litigation" and therefore did not have standing to file a notice of appeal). Mack's duties under state law are set out in A.R.S. 11-441. Mack has additional practical responsibilities that ensue from his management of his staff and office. Mack has sworn under oath to uphold his duties as sheriff. He has brought this lawsuit identifying himself as the Sheriff of Graham County. The county board has not authorized this suit and the County Attorney has informed Mack that he is not to use county facilities, staff, services or equipment in pursuit of the

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1265, 1270 (9th Cir. 1992). It is only if the language is unclear that the Court need refer to legislative history as an aid to statutory interpretation. *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

[6] At oral argument, counsel for the government cited 28 C.F.R. 0.25 for the proposition that CLEOs would be sheltered from subsequent prosecutions based on the opinion letter even if the interpretation were later to change. The regulation, however, offers Sheriff Mack no such reassurances.

litigation. Mack has retained private counsel to represent him.

The Court finds that there is no difference between Sheriff Mack's personal and official capacities for purposes of the duties imposed upon him by the Brady Act. The Act directs the CLEO as a county agent to perform its statutory mandates. Mack is thus forced to choose between violating his oath or violating the Act, subjecting himself to possible sanctions. Mack has a sufficient stake in the outcome of the proceedings to justify standing, regardless of whether it is characterized as private or official conduct. *See Board of Education v. Allen*, 392 U.S. 236 (1968) (plaintiffs' belief that statute forced them to choose between following oath and statute supplied personal stake necessary for standing).

The United States raises one final point – namely, its theory that Arizona law does not authorize its sheriffs to sue or be sued. Fed. R. Civ. P. 17(b) provides that the capacity to sue must be determined by state law. Pursuant to statute, the office of sheriff is named a county officer. A.R.S. 11-401. The powers of the county to sue and be sued "shall be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law." A.R.S. 11-201. Mack lists several early cases for the simple proposition that Arizona sheriffs regularly sue and are sued. This is hardly dispositive as "capacity to sue is not jurisdictional and can be waived." *Gonzales v. Arizona Public Service Co.*, 161 Ariz. 84, 87, 775 P.2d 1148, 1151 (App. 1989). Thus far, it would appear that Arizona courts have not had an opportunity to determine the extent of a sheriff's capacity to sue. The Supreme Court of West Virginia, when faced

with a similar issue, ruled that "the capacity to sue is an important incident to the duties of public officers and it is often necessary that such an official be able to ensure that he [or she] is acting properly by seeking court guidance." *State ex rel. Manchin v. Lively*, 170 W. Va. 672, 674, 295 S.E.2d 912, 915 (1982). That court cited with approval the following language found in 67 C.J.S. *Officers* sec. 250 (1978): "public officers have capacity to sue commensurate with their public trust or duties without express statutory authority." *Id. See also State ex rel. Hoagland v. School Dist. No. 13*, 116 Mont. 294, 151 P.2d 168 (1944) (implying right to sue into statute defining county superintendent's duties). This Court concurs in that reasoning. The government's argument was recently rejected in *McGee v. United States*, No. 2:94-CV-67PS (S.D. Miss. 1994). There, the District Court for the Southern District of Mississippi stated:

> "The cases are clear that the appropriate body to bring an action involving counties is the board of supervisors of such county. However, that is not the situation before this Court. Brady directs sheriffs (as chief law enforcement officers) to ascertain if obtaining a gun is in violation of the law, including checking whatever records are available. . . . This directive is not to the county. It is not to the attorney general. It is not any other state agency or to any federal agency."

McGee, slip op. at 5. Nor, it might be added, will the consequences of violating the Act be borne by anyone other than the CLEO.

The Court finds the standing and jurisdiction arguments presented by the United States to fall on all fronts.

It is irrefutable that the Act specifically imposes certain duties on a particular category of individuals – the CLEOs. Sheriff Mack is a CLEO for purposes of this statute. Should Sheriff Mack disregard his statutory responsibilities, he would place himself at risk of its criminal penalties. Thus, Sheriff Mack has standing to challenge the statute on Fifth Amendment grounds because of the potential sanctions he faces. Moreover, Sheriff Mack has standing to raise a Tenth Amendment claim because of his position as the state official to whom Congress has delegated the obligation to enforce federal law.

Commerce Clause and Tenth Amendment

Count One of Mack's Amended Complaint alleges that Congress has exceeded the scope of its powers under the Commerce Clause by legislating the requirement that he perform a background check on potential firearms purchasers. The flip side of this argument is Count Two of Mack's Amended Complaint, which contends that the Act's enforcement scheme infringes upon the state's sovereign powers reserved to it by the Tenth Amendment. As the Supreme Court noted, these inquiries go hand in hand. *New York v. United States*, 112 S.Ct. 2408, 2417 (1992). "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* "In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as

one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment." *Id.* at 2419

Turning first to Count One, legislation enacted under the Commerce Clause has a "presumption of constitutionality," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), and receives "a highly deferential" judicial review. *United States v. Edwards*, 13 F.3d 291, 293 (9th Cir. 1993). "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *FERC v. Mississippi*, 456 U.S. 742, 754 (1982) (internal citations and quotations omitted)

Applying these principles to the facts at hand, it is clear that the activity regulated by the Brady Act, the purchase of handguns, affects interstate commerce. This is not even a debatable question. *See Huddleston v. United States*, 415 U.S. 814, 833 (1974) (Congress is permitted to regulate intrastate redemption of firearms from pawnshops on the basis that such transactions affect interstate commerce); *Edwards*, 13 F.3d at 293 (Gun Free School Zones Act, prohibiting possession of firearms within 1,000 feet of a school, represents permissible exercise of Congressional power); *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991) (the violence created through the possession of firearms adversely affects the national economy

and therefore comes within the scope of Congressional authority).

The second prong of the analysis requires the Court to determine whether there is a rational connection between the background check requirement and the regulation of the transfer of handguns. The purpose of the investigation is to determine if a potential purchaser is legally entitled to possess a firearm. 18 U.S.C. 922(g). See also U.S.Const. art. I, sec. 8, cl. 18 (granting Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its delegated powers).

The issue is not, however, whether Congress possesses the raw power to regulate the transfer of handguns. Clearly it does. The thorny question is whether the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. The district court for the District of Montana framed the inquiry as follows: "This case turns on the proper relationship between the federal government and the several states, and in particular, on the constitutionality of federally imposed, unfunded mandates to the states." *Printz v. United States*, No. CV 94-35-M-CCL, slip op. at 3-4 (D. Mont. 1994). The Tenth Amendment confirms that the federal government has fixed powers. U.S. Const. amend. X (the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). "[A]ll is retained which has not been surrendered." *New York*, 112 S.Ct. at 2418 (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

In *New York v. United States*, the Supreme Court reviewed the history of the decisional law construing the delicate balance struck between the federalist compromise and a state's authority. The Supreme Court stated without hesitation that "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.* at 2429. *Compare FERC v. Mississippi*, 456 U.S. at 762 (federal government may enlist the judicial branch of state government to further federal ends). The *New York* Court held that the federal government could not force the state of New York to regulate nuclear waste in a certain way because in doing so, Congress exceeded its Article I powers. The statute offered state governments the choice of either regulating pursuant to Congressional dictates or accepting ownership of low level radioactive waste. Justice O'Connor, writing for the majority, held the statute invalid under the Commerce Clause and the Tenth Amendment because it " 'commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 112 S.Ct. at 2428 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

The parties present two very different views of the Brady Act. The government maintains that the Act's provisions are discretionary, cooperative, and clerical. The government goes so far as to say that were Sheriff Mack to find in his discretion and under the circumstances that a reasonable effort meant no investigation whatsoever,

that would be acceptable compliance.[7] For his part, Mack interprets the Act to be a direct command from Congress. Such a command would clearly involve the type of government conduct found to be unconstitutional in *New York v. United States,* 112 S.Ct. at 2425

Relying upon *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), the government first maintains that the Brady Act is a statute of general applicability and thus does not intrude upon the special preserve of state sovereignty. At issue in *Garcia* was whether Congress had exceeded its powers by requiring the states to comply with the Fair Labor Standards Act minimum wage and overtime requirements. In that case the Supreme Court found that the state "face[d] nothing more than the same obligations that hundreds of thousands of other employers, public as well as private, have to meet." *Garcia,* 469 U.S. at 554. Under *Garcia,* if states object to complying with FLSA, their recourse is to the political process of state participation in federal government action.[8] *Id.* at 556.

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[7] The government claims that the mandated actions are de minimis and therefore escape constitutional review. This position was accepted by the district court in *Koog v. United States,* No. DR-94-Ca-8 (W.D. Tex. 1994).

[8] Prior to *Garcia,* the FLSA was not applicable to states when they were performing traditional governmental functions. *National League of Cities v. Usery,* 426 U.S. 833 (1976). The *Garcia* Court rejected *National League of Cities*'s "traditional government functions" test. *Garcia,* 469 U.S. at 556-57. Thus, the government's argument to the contrary herein does not merit further comment.

The government's efforts to characterize the Brady Law as a law of general applicability are disingenuous. The specific dictates imposed upon state law enforcement personnel comprises the crux of this lawsuit. Those duties are not generally applicable but specially meted out to the CLEOs. Unlike the identical responsibilities imposed upon government and private employers under the FLSA, private entities have no corresponding duties under the Brady Act.

Next, the government dismisses the holding in New York as affecting only those federal laws which compel a state to legislate. Without doubt, the Supreme Court found the prospect of compelled legislation to be constitutionally objectionable. The reason for this principle, the Supreme Court explained, is that "where the federal government compels States to regulate, the accountability of both state and federal officials is diminished." *New York*, 112 S.Ct. at 2424. That loss of accountability, the Court concluded, undermines the purpose of federalism – to ensure that the interests of the citizen are adequately represented. *Id.* at 2431-32.

The government claims that the Brady Act does not usurp accountability from the states because the Act does not require, much less compel, the state legislature to do anything. *FERC v. Mississippi*, 456 U.S. at 764 (Public Utility Regulatory Policies Act of 1978 held constitutional because did not contain a federal command to promulgate and enforce regulations but merely required the states to consider federal standards); *Hodel*, 452 U.S. at 288 (Supreme Court upheld Surface Mining Control and Reclamation Act of 1977 because "the States are not compelled to enforce the steep-slope standards, to expend

any state funds, or to participate in the federal regulatory program in any manner whatsoever.").

True, the Brady Act does not require the state to legislate in order to enforce its provisions. In this respect, however, it is more like the "take title" section of the unconstitutional statute in *New York* which essentially operated upon default. This provision was found to be constitutionally defective even though no affirmative action was demanded of the state. In this case, the state is forced to expend time and resources toward implementation of the Act, even though legislation is not mandated.[9]

Finally, the government claims that the Tenth Amendment is not violated by a congressional order that a state implement a federal directive where doing so is exactly the type of activity the state ordinarily engages in. The government offers *Testa v. Katt*, 330 U.S. 386 (1947), in support of this proposition. Testa involved the state of Rhode Island's refusal to permit lawsuits to be filed in its courts under federal price control legislation which conferred dual jurisdiction upon state and federal courts. The Supreme Court held that Rhode Island could not refuse jurisdiction over federal claims to be adjudicated in its courts. *Testa*, 330 U.S. at 394. In evaluating the applicability of *Testa*, the *New York* Court declared that Testa was grounded upon the Supremacy Clause rather than the Tenth Amendment. *New York*, 112 S.Ct. at 2429-30.

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[9] For instance, the CLEO must address the reasons for ineligibility and destroy the sworn statement.

Accord FERC v. Mississippi, supra (Mississippi Public Service Commission had jurisdiction to entertain claims arising out of the Public Utilities Regulatory Policy Act of 1978). *Testa* is not controlling here.

In summary, the Brady Act's provision mandating that state law enforcement officials perform a background check exceeds Congressional powers under the Commerce Clause, thereby violating the Tenth Amendment.

Fifth Amendment Vagueness Claim

Mack also chailenges the Brady Act as unconstitutionally vague in violation of the Fifth Amendment Due Process Clause because it fails to make explicit, under threat of criminal punishment, the reasonable effort required when determining whether receipt or possession of a handgun would be in violation of the law. A statute is unconstitutionally vague if it threatens sanctions without giving fair warning of the conduct that is proscribed or demanded. *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972). " '[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.' " *United States v. Dischner*, 974 F.2d 1502, 1510 (9th Cir. 1992) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), *cert. denied*, 113 S.Ct. 1290 (1993)).

The United States maintains that Sheriff Mack lacks standing to pursue this claim in light of the Office of Legal Counsel's opinion letter proclaiming that the criminal sanctions of the Act were not meant to apply to CLEOs. Because the protection afforded Sheriff Mack by

the opinion letter is illusory,[10] Sheriff Mack is entitled to have the Court decide the merits of this claim. Accordingly, the Court concludes that the mandatory provisions of the statute must fall for vagueness.

The Act requires that Sheriff Mack make a "reasonable effort" to perform a background check within five business days, including research in a national system of records designated by the Attorney General as well as any "available" state and local records. 18 U.S.C. 922(s)(2). Reasonable effort is not defined by statute.

The United States offers one definition to complete the void. It insists that Sheriff Mack is not under a mandatory obligation to determine the legality of handgun transfers. The government's interpretation of the enforcement provisions merely directs the CLEO to determine whether, in light of the resources available in the specific jurisdiction, it would be reasonable to conduct a background check after notice of the proposed sale by a licensed gun seller. The government claims the Act would allow ever changing obligations, as appropriate, in light of individual circumstances. At various times and through various agencies, the government has posited that criminal sanctions do not apply to CLEOs or that criminal sanctions may apply, but only if the CLEO fails to expend "minimal efforts" in pursuit of his or her investigatory duties.

The government's position is untenable. When the language of a criminal statute is clear, as is true of 18 U.S.C. 922(s), the executive branch is not at liberty to

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[10] See supra note 6 and accompanying text.

amend that statute by fiat. Accordingly, the Court finds that Sheriff Mack faces criminal sanctions should he violate the Brady Act's mandatory provisions, but the statutory duty imposed upon him as the CLEO of Graham County is imprecise and indefinite. This runs afoul of the Fifth Amendment Due Process Clause.

Thirteenth Amendment Challenge

Mack next contests the Brady Act on the ground that its enforcement provisions constitute involuntary servitude prohibited by the Thirteenth Amendment. Involuntary servitude in violation of the Thirteenth Amendment "occurs when an individual coerces another into . . . service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor." *Brogan v. San Mateo County*, 901 F.2d 762, 764 (9th Cir. 1990) (quoting *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984)).

In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that a conviction for violating a statute enacted to enforce the Thirteenth Amendment required proof that the alleged victims were "forced to work for the defendant by the use or threat of physical restraint or physical injury" or by law, rather than merely by psychological coercion. *Kozminski*, 487 U.S. at 952. Where as here a person is free to refuse to work without incurring legal sanctions, the Thirteenth Amendment is not violated, even if the choice is a painful one. Mack need only quit his job to be free of the duties imposed upon him by the Act. Under these circumstances, the

Thirteenth Amendment is not implicated. *Id.* at 950 (quoting *United States v. Schackney*, 333 F.2d 475, 487 (2d Cir. 1964))

Severability of Offending Provisions

A statute that is partially unconstitutional may require the Court to invalidate the statute in its entirety. Mack maintains that the unconstitutional provisions of sec. 922(s) are "the heart and foundation of that entire subsection" and the illegality of the part infects the legality of the whole. "Unless it is evident that" Congress would not have enacted the constitutional provisions in a statute independently of any unconstitutional ones, "the invalid part may be dropped if what is left is fully operative as a law." *New York*, 112 S.Ct. at 2434 (citations omitted). Mack interprets both the statutory text and its legislative history to mean that the statute would not have been enacted absent the enforcement duties placed upon the CLEOs. Thus, he claims, the subsections under review are not severable and if even one subsection is unconstitutional the entire act must be rejected.

The Gun Control Act, of which the Brady Act is a part, does in fact contain a severability clause. Section 928 reads: "If any provision of this chapter . . . is held invalid, the remainder of the chapter . . . shall not be affected thereby." 18 U.S.C. 928. If a statute includes a severability clause, there is a presumption that any of its provisions found to be unconstitutional are severable. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). *See Board of Natural Resources v. Brown*, 992 F.2d 937, 948 (9th Cir. 1993) (the absence of a severability clause "does suggest

an intent to have all components operate together or not at all.").

The Supreme Court in *Alaska Airlines* expressed some doubt as to whether the severability clause contained within the Federal Aviation Act of 1958 applied to the Airline Deregulation Act of 1978, the provision under review. *Alaska Airlines*, 480 U.S. at 686 n. 8. As the Supreme Court explained, the Airline Deregulation Act did not truly amend the Federal Aviation Act, but created a whole new program. *Id.* That concern does not apply here. In contrast, the Brady Act does amend the underlying Gun Control Act. Rather than create an entire new program, the Brady Act simply provides a means for implementing the Gun Control Act's prohibition against sales to certain classes of buyers.

Even without applying the severability clause, the offending provision could be separated without doing damage to the entire Brady Act. An invalid provision is severable if the balance of the legislation is capable of functioning independently from the invalid provision, and the statute functions, in the absence of the objectionable provision, "in a manner consistent with the intent of Congress;" *Id.* at 684-85 (emphasis in original).

Accurately gauging the most vulnerable aspect of the Brady Act, the government is hopeful that the Court will limit its redaction to section 922(s)(2), the provision requiring local law enforcement officials to conduct a reasonable background search.[11] This proposal would

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[11] Mack's constitutional challenge encompasses three of the interim provisions of the Act, namely, the requirements that the

leave intact the five-day waiting period, the information and notification duties imposed on gun importers, dealers, and manufacturers, and the option for local officials to conduct a background check.

When considered absent the offending subsection, the statute loses none of its function. The test is whether the elimination "alters the substantive reach of the statute and leaves completely unchanged its basic operation." *Board of Natural Resources*, 992 F.2d at 948 (citations omitted). Irrefutably the balance of the interim provisions can function independent of the alleged invalid provision. Gun sales can be postponed for five days and sworn statements can be forwarded to CLEOs, regardless of whether CLEOs perform any of the three acts described in the challenged provisions.

The Court must next decide whether the offending portion is necessary for the remainder of the Act to function "in a manner consistent with the intent of Congress." The presence of the severability clause is again evidence that Congress intended for the statute to have continued viability, even though partially invalidated.

Mack disagrees, and argues that the bill was a product of a negotiated compromise which Congress would not have adopted but for its many parts. For instance, Mack refers the Court to the destruction requirement, which prevents the inadvertent creation of a registration system, to have been critical to the successful passage of

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CLEO conduct a background check, destroy sworn statements of purchasers after 20 days, and inform rejected purchasers of the reasons for the denial.

the bill. At bottom, Mack has not overcome the presumption in favor of severability and the Court can safely excise the offending provision.

By invalidating the mandatory background check provision, the requirements of the other challenged provisions become optional. For instance, 18 U.S.C. 922(s)(6)(C), which requires the CLEO to provide reasons to the denied purchaser for that determination, becomes elective depending on whether the state chooses to perform background checks. Similarly, 18 U.S.C. 922(s)(6)(B), which orders the CLEO to destroy the sworn statement within 20 days of the date of the transfer again will depend upon the state's voluntary decision to perform the background check. When viewed accordingly, the remaining provisions do not commandeer the states in any way and are therefore constitutional.

ORDER

The Court finds that in enacting section 18 U.S.C. 922(s)(2), Congress exceeded its authority under Article 1, section 8 of the United States Constitution, thereby impermissibly encroaching upon the powers retained by the states pursuant to the Tenth Amendment. The Court further finds that the provision, in conjunction with the criminal sanctions its violation would engender, is unconstitutionally vague under the Fifth Amendment of the United States Constitution.

Accordingly, IT IS HEREBY ORDERED that plaintiff Sheriff Richard Mack's complaint for declaratory and injunctive relief is GRANTED IN PART. The Clerk of the Court is directed to enter a judgment declaring 18 U.S.C.

922(s)(2) to be unconstitutional. IT IS FURTHER ORDERED that defendant United States of America and its agents are PERMANENTLY ENJOINED from further enforcing 18 U.S.C. 922(s)(2).

All other provisions under review are deemed severable from the offending subsection and are found not to violate the United States Constitution.

IT IS FURTHER ORDERED that all pending motions are deemed MOOT by virtue of this order and this case is DISMISSED.

Dated: June 28, 1994

JOHN M. ROLL
United States District Judge

107 STAT. 1536 (Nov. 30, 1993)

PUBLIC LAW 103-159

103d Congress

An Act

To provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I – BRADY HANDGUN CONTROL

SEC. 101. – SHORT TITLE.

This title may be cited as the "Brady Handgun Violence Prevention Act".

SEC. 102. FEDERAL FIREARMS LICENSEE REQUIRED TO CONDUCT CRIMINAL BACKGROUND CHECK BEFORE TRANSFER OF FIREARM TO NON-LICENSEE.

(a) INTERIM PROVISION. –

(1) IN GENERAL. – Section 922 of title 18, United States Code, is amended by adding at the end the following:

"(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell,

deliver, or transfer a handgun to an individual who is not licensed under section 923, unless –

"(A) after the most recent proposal of such transfer by the transferee –

"(i) the transferor has –

"(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

"(II) verified the identity of the transferee by examining the identification document presented;

"(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

"(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

"(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

"(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or

possession of the handgun by the transferee would violate Federal, State, or local law;

"(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

"(C)(i) the transferee has presented to the transferor a permit that –

"(I) allows the transferee to possess or acquire a handgun; and

"(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

"(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

"(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

"(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

"(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because –

"(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

"(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

"(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

"(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

"(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only –

"(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

"(B) a statement that the transferee –

"(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;

"(ii) is not a fugitive from justice;

"(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

"(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

"(v) is not an alien who is illegally or unlawfully in the United States;

"(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

"(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

"(C) the date the statement is made; and

"(D) notice that the transferee intends to obtain a handgun from the transferor.

"(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to –

"(A) the chief law enforcement officer of the place of business of the transferor; and

"(B) the chief law enforcement officer of the place of residence of the transferee.

"(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

"(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

"(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law –

"(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(I)(III)

"(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

"(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

"(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

"(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages –

"(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

"(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

"(8) For purposes of this subsection, the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

"(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.".

(2) HANDGUN DEFINED. – Section 921(a) of title 18, United States Code, is amended by adding at the end the following:

"(29) The term 'handgun' means –

"(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and

"(B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.".

(b) PERMANENT PROVISION. – Section 922 of title 18, United States Code, as amended by subsection (a)(1), is amended by adding at the end the following:

"(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless –

"(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

"(B)(i) the system provides the licensee with a unique identification number; or

"(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

"(C) the transferor has verified the identity of the transferee by examining a valid identification document

(as defined in section 1028(d)(1) of this title) of the transferee containing a photograph of the transferee.

"(2) If receipt of a firearm would not violate section 922 (g) or (n) or State law, the system shall –

"(A) assign a unique identification number to the transfer;

"(B) provide the licensee with the number; and

"(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

"(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if –

"(A)(i) such other person has presented to the licensee a permit that –

"(I) allows such other person to possess or acquire a firearm; and

"(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

"(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

"(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

"(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A) is impracticable because –

"(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

"(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

"(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

"(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

"(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Secretary may, after notice and

opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

"(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages -

"(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

"(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.".

(c) PENALTY. - Section 924(a) of title 18, United States Code, is amended -

(1) in paragraph (1), by striking "paragraph (2) or (3) of"; and

(2) by adding at the end the following:

"(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.".

. . . .

SEC. 104. REMEDY FOR ERRONEOUS DENIAL OF FIREARM.

(a) IN GENERAL. – Chapter 44 of title 18, United States Code, is amended by inserting after section 925 the following new section:

"§ 925A. Remedy for erroneous denial of firearm

"Any person denied a firearm pursuant to subsection (s) or (t) of section 922 –

"(1) due to the provision of erroneous information relating to the person by any State or political subdivision thereof, or by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act; or

"(2) who was not prohibited from receipt of a firearm pursuant to subsection (g) or (n) of section 922, may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be. In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.".

. . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Sheriff Richard Mack

v. No. 94-113-TUC-JMR

United States of America

Plaintiff Sheriff Richard Mack declares and states:

1. I am sheriff of, and reside in, Graham County, Arizona, having been elected by the citizens of that county in 1988 and since re-elected.

2. The office of sheriff is created by Article 12, § 3 of the Constitution of Arizona; its duties are fixed by Arizona Revised Statutes, Title 11; its budget allocations are fixed by the County Board of Supervisors.

. . . .

9. I have in my office an undersheriff, one detective, a patrol sergeant, and nine deputies for active patrol. These must provide 24 hour law enforcement for 4,500 square miles under my jurisdiction, occupied by 28,000 persons. By my calculation, we average 1.5 deputies on patrol at any given moment, for this entire area. Between the necessity of responding to actual calls, these are hard put to provide routine patrol. Until recently, I performed our Drug Abuse Resistance Education duties myself, simply so that we would not have to take a deputy off patrol to carry it out. If I am now compelled to perform background checks of our residents, it will have to be done by pulling deputies off patrol. For a large department, removing one deputy from patrol may not be a burden.

For the 28,000 residents of Graham County it means an 11% reduction in law enforcement protection.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Sheriff Richard Mack

v. No. 94-113-TUC-JMR

United States of America

Reporter's Transcript of Proceedings
Before the Honorable John M. Roll
May 31, 1994

[Testimony of Sheriff Richard Mack]

[p. 7] Q. Based on your three months' experience with the Act, how much time would you say, man-hours wise, you are putting in on it?

A. Probably for all personnel that have participated, it is an average of an hour or two a day.

Q. How many 'hits' have you had in the last three months?

A. Out of all the checks that we have done, which have numbered over 80, there was one that was questionable, and we denied a handgun purchase to that individual.

Q. Did he agree with your finding that it was questionable?

A. No, he was quite upset. He did not agree with it. He said that his civil rights have been restored. The conviction that it shows on his rap sheet was from another state, so I wasn't able to verify it then. I told him he would have to show me verification of that.

. . . .

[p. 8] Q. Have you received criticism from persons regarding your performance of the checks?

A. Yes, they believe that it was a waste of time, and that the Sheriff's Office should be spending County taxpayer dollars on more pressing matters.

Supreme Court, U.S.
FILED
MAY 15 1996
CLERK

(3)

No. 95-1503

In the Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD MACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
WALTER DELLINGER
FRANK W. HUNGER
Assistant Attorneys General
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14 P

QUESTION PRESENTED

The Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)(2), provides, *inter alia*, that, within five business days of a firearms dealer's proposal to transfer a handgun, the "chief law enforcement officer" (the chief of police or sheriff) shall make a "reasonable effort" to ascertain whether the transferee's receipt or possession of the handgun would be in violation of the law. The question presented is whether the Brady Act exceeds Congress's power under the Commerce Clause or contravenes the Tenth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1503

RICHARD MACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 66 F.3d 1025. The opinion of the district court (Pet. App. 26-50) is reported at 856 F. Supp. 1372.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1995. A petition for rehearing was denied on December 19, 1995. Pet. App. 24-25. The petition for a writ of certiorari was filed on March 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Gun Control Act of 1968 (GCA), 18 U.S.C. 921 *et seq.*, establishes a comprehensive federal regulatory scheme governing the manufacture and distribution of firearms in interstate commerce. Under the GCA, it is unlawful for certain persons, such as convicted felons and fugitives from justice, to receive or possess firearms in interstate commerce. See 18 U.S.C. 922(g). Under the GCA, it is also unlawful for any person to transfer a firearm to another, knowing that the transferee is prohibited by Section 922(g) from receiving or possessing a firearm. See 18 U.S.C. 922(d).

In the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (1993) (Brady Act), Congress amended the GCA to address the national "epidemic of gun violence" by enhancing enforcement of its restrictions on gun transfers. See H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993). The Brady Act requires the federal government to establish a national instant criminal background check system by November 30, 1998. 18 U.S.C. 922 note. Once the national instant criminal background check system is in place, firearms dealers will be required (with certain exceptions) to contact that system to determine whether any legal impediment exists to the sale of a firearm. See 18 U.S.C. 922(t)(1)(A).

Because the national instant criminal background check system may not be fully operative until late 1998, Congress also enacted interim provisions to enhance enforcement of the GCA's transfer restrictions. Those interim provisions, which are the subject of this case, operate in relation to proposed transfers of handguns by federally licensed fire-

arms dealers. Under the interim provisions, firearms dealers who propose to transfer a handgun must provide the "chief law enforcement officer" (CLEO) of the transferee's residence[1] with information about the proposed transfer, and may not make the transfer until five business days have elapsed after providing such notice. See 18 U.S.C. 922(s)(1)(A). If, within that five-day period, the CLEO informs the dealer that the CLEO has no information that the transferee's receipt or possession of a handgun would be illegal, then the transfer may go forward. See 18 U.S.C. 922(s)(1)(A)(ii)(II). The transfer may also go forward after five days if the dealer receives no information from the CLEO at all. See 18 U.S.C. 922(s)(1)(A)(ii)(I).

To enable CLEOs to determine whether receipt of a handgun would be illegal, prospective handgun purchasers must provide firearms dealers with their name, address, and date of birth. 18 U.S.C. 922(s)(1)(A)(i)(I), 922(s)(3)(A). The dealer must then give that information to the jurisdiction's CLEO. 18 U.S.C. 922(s)(1)(A)(i)(III) and (IV). During the ensuing five-day waiting period, the CLEO "shall make a reasonable effort" to determine whether a legal impediment exists to the proposed sale:

> A chief law enforcement officer to whom a transferor has provided notice * * * shall make a

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[1] The Brady Act defines the "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. 922(s)(8). The Brady Act's interim provisions do not apply in States and Territories that have their own background check requirements. 18 U.S.C. 922(s)(1)(C) and (D); see 59 Fed. Reg. 37,532, 37,534 (1994).

> reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law, including research in whatever State and local record-keeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. 922(s)(2). It is the provision for a "reasonable effort to ascertain" whether receipt or possession of the handgun would be illegal to which petitioner objects.

Shortly after enactment of the Brady Act, the Bureau of Alcohol, Tobacco and Firearms (ATF), which is charged with interpretation and implementation of the GCA (see 18 U.S.C. 926; 37 Fed. Reg. 11,696-11,697 (1972)), issued an open letter providing guidance to CLEOs on, *inter alia*, the "reasonable effort" provision. See 95-1478 U.S. Br. App. 13a-17a.[2] ATF explained that, since CLEOs themselves are in the "best position to determine" what constitutes a "reasonable effort," *id.* at 15a, "[e]ach * * * CLEO will have to set its own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction," *id.* at 14a-15a. ATF further explained that, while the Brady Act generally "anticipates some minimal effort to check commonly available records," CLEOs are not obliged to check "every conceivable record system that may contain information relating to categories of prohibited persons." *Id.* at 13a-14a. ATF also made clear

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[2] "95-1478 U.S. Br. App." refers to the appendix to the brief for the United States in response to the petition for a writ of certiorari in *Printz* v. *United States*, No. 95-1478 (petition filed Mar. 15, 1996).

that, since the "vast majority of [disqualified] persons * * * are prohibited by virtue of some criminal background," a CLEO's reasonable effort should normally focus on criminal history records. *Id.* at 14a. Finally, ATF stated that, in some circumstances, as when a CLEO has personal knowledge of a gun purchaser, a CLEO may legitimately decide that it is "reasonable" to do little or no research. *Ibid.*

The Brady Act does not require that a CLEO act to prevent the transfer of a handgun if the CLEO concludes that the purchaser's receipt of the gun would be illegal. Thus, if the CLEO determines, for investigative or law enforcement purposes, that the transfer should be permitted to go forward, the CLEO may decline to inform the firearms dealer that the transfer is unlawful. If, however, the CLEO finds no impediment to the proposed handgun sale, the records related to the referral from the firearms dealer must be destroyed. 18 U.S.C. 922(s)(6)(B)(i). And if the CLEO determines that the prospective purchaser's receipt of the handgun would be unlawful and so informs the dealer, the prospective purchaser may request that the CLEO provide written reasons for the determination within 20 business days. 18 U.S.C. 922(s)(6)(C). The Brady Act provides CLEOs with immunity from damages actions for failing to prevent an unlawful handgun sale, or for mistakenly concluding that a transfer would be contrary to law. 18 U.S.C. 922(s)(7).

2. Petitioner is the Sheriff of Graham County, Arizona. Pet. App. 3. He contended that the Brady Act's interim requirements, including the requirement that he make a "reasonable effort" to ascertain if there is a legal impediment to a handgun sale, violate the Tenth Amendment. See *ibid.* The district

court held that the "reasonable effort" requirement contravenes the Tenth Amendment. *Id.* at 43. It determined, however, that the background check provision is severable from the remainder of the Act, including the five-day waiting period. *Id.* at 49.

Both parties appealed, and a divided panel of the court of appeals upheld the Brady Act in its entirety. Pet. App. 1-23.[3] The court concluded that the Brady Act does not transgress any "implied limitation on federal power," *id.* at 6, and that there is "nothing unusually jarring to our system of federalism" in the challenged provisions of the Brady Act, *id.* at 8. The court noted that this Court has rejected the argument that "Congress has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it," as "not representative of the law today." *Ibid.* (quoting *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982)).

The court rejected in particular petitioner's contention that, under *New York* v. *United States*, 505 U.S. 144 (1992), "the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program." Pet. App. 8. The court explained that "[t]he constitutional evil that *New York* addressed was one recognized by several of [this Court's previous cases]: the federal government

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[3] The court of appeals decided this case in conjunction with a similar appeal and cross-appeal raising the same issues in a challenge brought by Jay Printz, the Sheriff of Ravalli County, Montana. See Pet. App. 1-3. Sheriff Printz has filed a separate petition for a writ of certiorari to review the judgment below. *Printz* v. *United States*, No. 95-1478 (filed March 15, 1996). We have suggested that the Court grant the petition for a writ of certiorari in *Printz*. See U.S. Br. at 10, *Printz* v. *United States*, No. 95-1478 (May 1996).

was attempting to direct the States to enact their own legislation or regulations according to a federal formula." *Id.* at 9. The court noted that "federal coercion of a State's enactment of legislation or regulations or creation of an administrative program" raises Tenth Amendment concern, because that coercion impinges on the States' sovereign authority to set policy, and also undermines political accountability. *Id.* at 11. As the court explained, "[w]hen the federal government requires the States to enact legislation, the enacted legislation is *state* legislation. Thus, it will likely 'be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.'" *Id.* at 11-12 (quoting *New York*, 505 U.S. at 169).

The court concluded that the Brady Act "is not the kind of a federal mandate condemned by *New York*." Pet. App. 12. It stressed that CLEOs "are not being commanded to engage in the central sovereign processes of enacting legislation or regulations" and "are not even being asked to produce a state policy, for which the state must bear political accountability." *Ibid.* Moreover, it stated, CLEOs' "activities are not alien to their usual line of work, and represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials." *Id.* at 13.

Although the court assumed that "there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment," it concluded that "the Brady Act does not approach that

point." Pet. App. 14. It observed that petitioner has not been subjected to any requirement to do more "than check computer records," and it stated that, on such a record, it "[could not] conclude that 'a reasonable effort' inevitably requires more than [a] minimum for [petitioner]. To perform such computer checks * * * has not been shown to constitute the kind of interference with state functions that would raise Tenth Amendment concerns." *Ibid.*[4]

3. After the court of appeals issued its decision in this case, two other courts of appeals ruled on similar constitutional challenges to the Brady Act. The Second Circuit upheld the constitutionality of the Brady Act. *Frank* v. *United States*, 78 F.3d 815 (1996). The Fifth Circuit, however, held that the provisions of the Brady Act challenged in the present case violate the Tenth Amendment. *Koog* v. *United States*, 79 F.3d 452 (1996).

DISCUSSION

Petitioner contends that the Brady Act's interim requirement that CLEOs make a "reasonable effort" to ascertain if there is a legal impediment to a handgun sale violates the Tenth Amendment. Petitioner argues that the court of appeals' decision conflicts with *New York* v. *United States*, 505 U.S. 144 (1992). Those contentions are incorrect. The Brady Act is consistent with the long-settled understanding that Congress may impose certain duties on state officials to carry out federal law. It does not present the threats to sovereignty and accounta-

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[4] Judge Fernandez dissented in part. He would have held unconstitutional the Brady Act's requirement that CLEOs make a reasonable effort to determine whether the proposed transfer of a handgun would violate the law. Pet. App. 20-23.

bility, the values protected by the Tenth Amendment, that were present in the statute reviewed in *New York* v. *United States*.

Nevertheless, the Fifth Circuit has now ruled, in conflict with the decision below and with a decision of the Second Circuit, that the Brady Act does violate the Tenth Amendment. *Koog* v. *United States*, 79 F.3d 452 (1996). Because of the conflict in the circuits on the constitutionality of an Act of Congress, and the significance of the question of federal constitutional law presented by the petition, we have suggested that the Court grant certiorari in *Printz* v. *United States*, No. 95-1478, which also seeks review of the decision of the court of appeals in this case. Accordingly, this case should be held pending the final disposition of *Printz*. Alternatively, both petitions could be granted and the cases consolidated for briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be held pending the final disposition of *Printz* v. *United States*, No. 95-1478, and then be disposed of as appropriate in light of the disposition of that case. In the alternative, the petition for a writ of certiorari should be granted and the case should be consolidated for briefing and argument with *Printz*.

Respectfully submitted.

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No. 95-1503

In The

Supreme Court of the United States

October Term, 1995

SHERIFF RICHARD MACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, Petitioner submits this supplemental brief to inform the Court of recent circuit decisions regarding the issues raised by his petition. With these rulings, the Courts of Appeals have divided as to the constitutionality of the statute at issue and as to the interpretation of this Court's ruling in *New York v. United States*, 505 U.S. 144 (1992).

This case presents the question of whether 18 U.S.C. § 922(s), which commands designated State officials to investigate and approve purchasers of handguns from Federally-licensed firearms dealers, violates the Tenth Amendment and exceeds Commerce Clause powers. The Ninth Circuit, in the ruling from which certiorari is sought, upheld the statute against these challenges.

On March 21, 1996, the Court of Appeals for the Fifth Circuit struck, as violative of the Tenth Amendment, the duties imposed on State officials by 18 U.S.C. § 922(s). *Koog v. United States*, No. 94-50562, 1996 US App. Lexis 5289. In so doing, it expressly rejected the Ninth Circuit's reading of *New York*: "With due respect for our sister circuit and its distinguished panel of judges, we cannot agree." Slip op. at 22.

In the ruling here at issue, the Ninth Circuit interpreted *New York*'s bar on forced "administration" of Federal programs to bar only forced legislation or policy decisions, and held that the statute did not require such. The Fifth Circuit disagreed with both premises. It rejected the enact/enforce distinction, suggesting that this Court's use of "administer" logically covers implementation and

enforcement, *Id.* at 13, n.4, and noting *New York*'s admonition that the Commerce Clause authorizes Federal regulation of commerce, not orders to the States to regulate it. *Id.* at 9. It added that the statute in any event required judgments indistinguishable from policy decisions. *Id.* at 13, n.4, 15-16.

To the extent an enact/enforce distinction could be drawn, the Fifth Circuit sided with Judge Fernandez's Ninth Circuit dissent: coerced enforcement of Federal programs would constitute the *greater* violation of the principles of federalism.

> Congress's bypass of state legislative processes here constitutes a greater incursion into state sovereignty than forcing the States to enact legislation: a bypass disposes of even the pretext of minimal state discretion that is present when the federal government forces a State to employ its legislative processes to achieve a given end.

Slip op. at 19. To the Fifth Circuit, 18 U.S.C. § 922(s) was a violation of the political accountability principles underlying *New York*. State officials must bear the blame for diverting resources, the responsibility for determining what was a "reasonable effort," the anger of rejected buyers, and risk of suit should they err. "For citizens that encounter the palpable consequences of this law, Congress is nowhere to be found." Slip op. at 20.

In contrast, the Second Circuit has rendered an opinion upholding 18 U.S.C. § 922(s) against identical challenges. *Frank v. United States*, No. 95-6019, US App. Lexis 4615 (Mar. 15, 1996). The Second Circuit cited the Ninth in reading *New York* to bar only forced legislation or regulation, not forced execution of Federal programs. Slip

op. at 23-24. "Federalism is too crucial, too central to our system of government to be trivialized by a rule that would make any co-optation of any state official into a violation of the Constitution." *Id.* at 28.

Accountability was not blurred in the Second Circuit's eyes since "the federal government has taken responsibility for determining the applicable standards, and state officials are being asked to apply those standards." *Id.* at 29. The statute was within the commerce power since firearms moved in commerce, and thus State officials could be required to aid in their regulation. *Id.* at 2-3, 24-25. The Second Circuit accordingly upheld 18 U.S.C. § 922(s).

We submit that with these recent decisions the Courts of Appeals have divided on the constitutionality of 18 U.S.C. § 922(s), and on the core meaning of this Court's ruling in *New York*.

Respectfully submitted,

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SHERIFF RICHARD MACK,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE WYOMING SHERIFFS ASSOCIATION IN SUPPORT OF PETITIONER

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IDENTITIES AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the Wyoming Sheriffs Association ("WSA") submits this brief *amicus curiae* in support of Petitioner Sheriff Richard Mack. Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.

Amicus, WSA, is an unincorporated Wyoming association whose membership includes twenty-three elected chief law enforcement officers who serve as county sheriffs in the State of Wyoming. The WSA's President is Sheriff Byron Odekoven of Campbell County, Wyoming. The WSA is itself party to a similar challenge to Petitioner's, having filed suit against the United States in the United States District Court for the District of Wyoming (No. 95-CV-066-D) on March 27, 1995. The WSA has alleged, *inter alia*, that enactment of 18 U.S.C. § 922(s) is beyond the power delegated to Congress in Article I, § 8, Cl.3 of the United States Constitution to regulate commerce; violates the Tenth Amendment to the Constitution; and violates the Appointments Clause of Article II, § 2 of the Constitution. On August 25, 1995, the District Court heard argument on the parties' cross-motions for summary judgment. To date, the District Court has not issued a ruling.

Amicus seeks to augment the argument presented by the Petition for Writ of Certiorari. *Amicus* believes that its member sheriffs' perspective, with regard to their geographically large county areas and limited resources will provide an additional viewpoint with respect to the constitutional issues presented.

Amicus wishes to underscore the fact that Supreme Court Rules 10(a) and (c) list among the considerations governing review on *certiorari*, the circumstances when a United States Court of Appeals enters a decision in conflict with another United States Court of Appeals, or has decided a federal question in a way that conflicts with applicable decisions of this Court. *Amicus* submits that both of these grounds for review are present in this case.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amicus hereby adopts Petitioners' statement and description of other opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF ARGUMENT

A divided panel of the United States Court of Appeals for the Ninth Circuit has reversed two United States District Courts, and has upheld the constitutional validity of 18 U.S.C. § 922(s) [("Brady Act")] against a challenge brought by two county sheriffs based upon the Tenth Amendment to the United States Constitution. *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995).

Subsequently, the United States Court of Appeals for the Second Circuit held, consistent with the Ninth Circuit, that 18 U.S.C. § 922(s) is constitutional. *Frank v. United States*, ___ F.3d ___, 1996 WL 116182 (1996). One week later, the United States Court of Appeals for the

Fifth Circuit found 18 U.S.C. § 922(s) to be unconstitutional as a violation of the Tenth Amendment. *Koog v. United States*, ___ F.3d ___, 1996 WL 131950 (1996).

These cases all involve the same statutory provision that is also the subject of ongoing actions in several United States District Courts, including an action involving *Amicus* WSA in the District of Wyoming. Therefore, *Amicus* believes that this court should grant Petitioner's Petition for Writ of Certiorari to resolve the present and direct conflict between the federal circuits and give needed guidance to the U.S. District Courts.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT IMPUGNS FUNDAMENTAL NOTIONS OF FEDERALISM AND STATE SOVEREIGNTY

Amicus submits that this Court's review of the attendant Petition should rightfully begin with a consideration of "first principles." *United States v. Lopez*, 115 S.Ct. 1624 (1995). As for nearly two hundred years, this Court has held that "It is, emphatically, the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137 (1803).

The scope of Congress' power under the Commerce Clause is set forth in *Hodel v. Virginia Surface Mining & Reclamation Assoc.*: "This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." 452 U.S. 264, 276-277 (1981). Perhaps the quick conclusion

is that the foregoing defines an unlimited power, one that is unlimited both in its jurisdictional reach and in Congress' authority to set the limits of that reach. However, the constant refrain in most, if not all, of this Court's cases reviewing each new exercise of the Commerce power is that there are not only limits, but constitutionally required limits dictated by the federalist structure embodied in the Constitution. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *United States v. Lopez*, 115 S.Ct. 1624 (1995).[1]

In light of this federalist structure, the Commerce power cannot be unlimited, because it is only one of several defined and enumerated powers. *U.S. v. Lopez*, 115 S.Ct. at 1628.[2] *Amicus* submits that when an exercise

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[1] *See, also, U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, ___, 115 S.Ct. 1842, 1972, 131 L.Ed.2d 881 (1995) (Kennedy, J., concurring) (observing that the Constitution "establish[es] two orders of government, each with its own set of mutual rights and obligations to the people who sustain it and are governed by it").

[2] [I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce. Nor is it sufficient that the person or activity reached have some nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a substantial effect on interstate commerce. Moreover, simply because Congress may conclude that a particular activity *substantially* affects interstate commerce does not necessarily make it so.

Hodel at 310-311 (Rehnquist, J., concurring) (citations omitted) (emphasis added).

of the Commerce power threatens to "obliterate the distinction between what is national and what is local," it is the duty of this Court to articulate and apply constitutional limits upon that power. Thus, while Congress' power is plenary, Congress does not possess the authority to reach beyond the boundaries established by the Constitution. The Commerce power is plenary only within its own sphere. In the words of Justice Black, "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source." *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion).

If the Framers intended to give Congress the power to operate in all spheres, it would not have been necessary to list the spheres of Congressional power in the Constitutional text. Moreover, to remove any doubts as to the intentions of the Framers in this regard, the principle was included within the Bill of Rights and expressly added to the Constitution via the Tenth Amendment. Indeed, "the Tenth Amendment and the Commerce Clause . . . are but two sides of the same coin." *Lopez, supra* at 1346. Regarding the Tenth Amendment side of the coin, "state sovereignty is not just an end in itself," *New York v. United States*, 112 S.Ct. at 2431, but "[r]ather federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

In deciding whether the limits of any enumerated power have been exceeded, this Court's precedent requires consideration of the Tenth Amendment and the principles of federalism embodied therein:

> The Tenth Amendment likewise restrains the power of Congress. . . . [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by [a limitation on an Article] power.

New York v. United States, 112 S.Ct. 2408 (1992).

Regrettably, this Court's decision in *New York*, and its discussion of the core values of federalism have been lost on the Ninth Circuit. Instead, the decision of the Ninth Circuit suggests that the challenge brought by the Petitioner involves small matters and mere quibbling in light of the undeniable juggernaut of Congressional power that has been unleashed under the Commerce Clause. However, "for want of a nail" large causes have been lost and it will not do, therefore, to dismiss considerations of small things as small things or mere quibbling when they relate to the structure of the Constitution itself. Accordingly, *amicus* WSA requests that the Court grant the Petition for Writ of Certiorari to conclusively determine whether the imposition of federally mandated affirmative duties upon local law enforcement officials violates the Tenth Amendment by impermissibly encroaching upon the sovereignty of state governments.

II. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH SUPREME COURT PRECEDENT INTERPRETING THE TENTH AMENDMENT AS AN EXPRESS LIMITATION ON CONGRESSIONAL AUTHORITY.

This Court's most recent expatiation on the Tenth Amendment and its attendant constitutional limitation on federal authority occurred in *New York v. United States*, 505 U.S. 144 (1992). *Amicus* submits that this Court's decision in *New York* is central to the question presented in the Petition. In *New York* this Court invalidated one of the provisions of the Low-Level Radioactive Waste Amendments of 1985 that ordered state governments to either take full legal title to certain wastes created by private entities (and consequently incur liability) or, alternatively, to regulate the waste according to federal mandates. This Court held:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the United States. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty'. . . . Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or *administer* a federal regulatory program.

Id., 112 S.Ct. at 2434-35 (emphasis added).

Therefore, *New York* does not represent a narrow or aberrational holding, but mandates that Congress may not

single out State officials and conscript them as its agents.[3] Like the take-title provision of the statute invalidated in *New York*, the Brady Act "offers a state government no option other than that of implementing legislation enacted by Congress." *Id.* at 177, 112 S.Ct. at 2429.

The duties imposed by 18 U.S.C. § 922(s) on all "Chief Law Enforcement Officials" ("CLEOs"), such as *amicus* WSA sheriffs, are new federally prescribed, non-discretionary tasks that are mandated without the consent or participation of the State of Wyoming. Wyoming law does not require Wyoming sheriffs to perform the duties that the Brady Act imposes on them. In the face of Congress' substantive amendment of Wyoming policy as to the proper role and duties of the CLEO, Wyoming is powerless to change this result.[4]

18 U.S.C. § 922(s) imposes enumerated Federal duties on CLEOs that are specifically defined to include those elected to State office. The omission of duties for federal officials was not unintentional as Congress rejected a proposal to have the labor undertaken by federal employees.[5] These federally mandated duties frustrate a

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[3] This Court has made clear that the Commerce Clause only empowers the federal government to act upon individuals rather than upon the states themselves. *See New York* at 2430-31.

[4] *Amicus* WSA's sheriffs are required by law to devote full time to their state law enforcement duties or they are subject to malfeasance charges and removal from office. In addition, they are personally liable for the acts of their deputies and assistants. Wyoming Statute §§ 18-3-106, 111 and 901.

[5] Rep. Schiff described unsuccessful attempts at amendment: "My first amendment proposed to change the burden of performing the background check from state and

State's ability to have CLEOs perform state-chosen responsibilities, such as the enforcement of local laws, the maintenance of jails or the transportation of criminals. To the sheriffs of the WSA, the more "federal" duties they must perform, the fewer "state" duties they have time and resources for. *Amicus* submits that whatever the outer limits of state sovereignty may be, they surely encompass the right to set the duties of office for state-created officials and to regulate the internal affairs of those governmental bodies.

Amicus' member sheriffs' experience is that each background check requires as long as one hour to complete if it is under ordinary circumstances. The sheriffs' offices of the various Wyoming counties have processed as many as several thousand applications since the inception of the Brady Act. Notably, the number of deputies available in each Wyoming county ranges from four to thirty. There are also only one to eighteen deputies on duty at any given time who are responsible for patrolling areas ranging in size from 3,250 square miles to as large as 11,000 square miles.

The Ninth Circuit repeatedly terms such added burdens as "only minimal requirements" *Mack*, 66 F.3d at 1031. Regrettably, the Ninth Circuit's unfortunate characterization vividly underscores one significant rationale underlying federalism: Washington can be hopelessly out of touch with local conditions.

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local law enforcement to the Federal Bureau of Investigation, which maintains the most comprehensive criminal records in the country." H.R. Rep. No. 103-344 at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin. News at 2008.

The Ninth Circuit's rationale conflicts with this Court's decision in *New York*, as *New York* recognizes no *de minimus* exception. The Constitution is, in Article VI, declared the "Supreme law of the land;" and this Court has accordingly been loath to find that a violation is a "trifle," with which "the law is not concerned."[6]

Further, logistical burdens are not the only relevant Tenth Amendment impact. In *New York*, this Court also noted that such Federal "commandeering" of state officials undermines the very core of federalism: "[I]t may be State officials who bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramification of their decision." *Id.* at 2424. Regrettably, some of *Amicus'* member sheriffs have taken the brunt of criticism from constituents who hold them blameworthy for performing the duties which Congress, insulating federal employees, demands of them rather than matters deemed of greater local concern.

The Ninth Circuit's glib attempt to reverse this Court's Tenth Amendment jurisprudence fails. In *New York*, this Court emphasized that the constitutional infirmity therein extended to forced administration.

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[6] *See e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) ($1.50 poll tax); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) ($10 fine). *Amicus* submits that the core principles of federalism are no trifle. The burdens upon *Amicus'* members and their offices are substantial, ranging up to 20% of their working day.

> Whatever the outer limits of [State] sovereignty may be, one thing is clear: the Federal government may not compel the States to enact *or administer* a federal regulatory program.

112 S.Ct. at 2435 (emphasis added). This Court's explanation is clear that neither legislation nor ownership can be compelled, so that a choice between the two is an impermissible dilemma.[7]

The Ninth Circuit also held that 18 U.S.C. § 922(s) regulates "commerce" and is therefore constitutional. However, *Amicus'* members contend that they are not engaged in commerce when they: (1) individually *decline* to perform background checks; or, (2) officially undertook their functions as sheriffs of the various Wyoming counties without performing such checks. None of this Court's cases hold or even suggest that the state's exercise of its police power with regard to an economic activity which affects interstate commerce is itself an economic activity

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[7] Amicus submits that to demand that the States resolve a problem is bad enough; to dictate the resolution and order their servants to execute it is worse. Federalism is undermined when Congress "compels state agencies . . . to function as bureaucratic puppets of the Federal government." *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 642 n.29 (1986). *Amicus* believes that at the very core of *New York* is the recognition that Congress cannot "present a simple command to state governments to implement legislation enacted by Congress," 112 S.Ct. at 2428. To the extent forced administration of law differs from forced making of law, it is a more egregious breach of federalism – as the dissenting Ninth Circuit Judge and the Fifth Circuit recognized. *Mack*, 66 F.3d at 1035 (Fernandez, J., dissenting); *Koog*, 1996 WL 131950 at 5.

or species of commercial intercourse subject to regulation by Congress.

Amicus submits that to invoke federal preemption in this context – where the State was declining to regulate or burden commerce – would require that the doctrine be distorted almost beyond recognition. As this Court has previously elaborated:

> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise power through the mechanism of mandating state regulation. The Constitution established Congress as a 'superintending authority over the reciprocal trade' among the States. The Federalist No. 42, . . . by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to state governments.

New York, 112 S.Ct. at 2430-31 (emphasis in original).

Here, *Amicus* WSA members are neither engaging in commerce, nor restricting it, if they decline to perform background checks. The fact that a firearms dealer may be engaging in such commerce is beside the point. *Amicus'* members are not firearms dealers. They are not affecting or burdening interstate commerce; rather, it is solely through the Brady Act that Congress seeks to force them to affect interstate commerce. Amicus submits that such compulsion is beyond Congressional powers.

Despite the Ninth Circuit's obscured distinction, there is no precedential ambiguity here; in its absence, a

court cannot rewrite the statute into constitutional form. *Aptheker v. Secretar*, 378 U.S. 500, 515 (1964). "The intention of Congress is revealed too distinctly to permit us to ignore it because of misgivings as to power. The problem must be faced and answered." *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). The sheriffs of Wyoming, and all others similarly situated who are forced to heed the Brady Act's mandate, therefore, have a compelling need for resolution of the constitutional issues posed by the Petition.

III. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH A DECISION OF THE FIFTH CIRCUIT AND REQUIRES THIS COURT'S INTERVENTION

The Ninth Circuit's opinion upholding the Brady Act directly conflicts with a recent decision of the Fifth Circuit. *Koog v. United States*, ___ F.3d ___, 1996 WL 131950 (1996). In *Koog*, the Fifth Circuit expressly considered and rejected the reasoning of the Ninth Circuit's decision in *Mack*. Further, the Fifth Circuit specifically rejected the Ninth Circuit's characterization of the Brady Act imposition on a CLEO as "minimal," *Koog*, 1996 WL 131950 at 9.

> We do not consider it a minimal interference when a local sheriff or chief of police is offered no choice but to devote purely local manpower and monetary resources to check the backgrounds of countless applicants for handgun purchases.

Id.

After reviewing the Brady Act's requirements of forced administration, the Fifth Circuit found that the Brady Act also violated the political accountability principles underlying this Court's decision in *New York*.

> For citizens that encounter the palpable consequences of this law, Congress is nowhere to be found. Congress does not employ the CLEO, supervise his work or pay his salary; the nameplate of no federal office is on his door. But the diffusion of accountability does not end at this point. Even if the affected citizen is aware that the legislation mandating background checks springs from the national government, and then turns to the Brady Act to determine political accountability, he will find that the CLEO himself is responsible for deciding what is a "reasonable" search. Laying this responsibility on the CLEO's political doorstep permits Congress effectively to shift "the political liability for subsidiary decisions from federal to state officials."

Koog, at 1996 WL 131950 at 8.

The problems created by the current conflict between the federal Circuits has far reaching consequences. *Amicus* sheriffs' responsibilities under the Brady Act will now be further hampered and expose them to increased risk of error because a large jurisdiction within the country is now no longer under a legal duty to comply with the dictates of the Brady Act. In contrast, *Amicus'* members are public officials bound by oath of office and the Supremacy Clause. They have been advised by their respective county attorneys that they are bound to follow the Brady Act unless and until it is held unconstitutional.

Therefore, because of the tremendous impact of the present conflict in the federal Circuits, the Petition for Writ of Certiorari should be granted to determine the constitutionality of 18 U.S.C. § 922(s) and the meaning of this Court's decision in *New York*.

IV. IMPORTANT SEPARATION OF POWERS QUESTIONS ARE PRESENTED BY THE PETITION.

The Constitution diffuses power among the legislative, judicial, and executive branches in order to protect individual liberty. *United States v. Munoz-Florez*, 495 U.S. 385, 394 (1990).[8] The Appointments Clause in Article II, § 2 of the U.S. Constitution protects one aspect of this separation of powers by vesting in the President the power to appoint officers of the United States. This Court has previously held that the Constitution expressly and implicitly vests the power to appoint and control executive officers in the President. *Meyers v. United States*, 272 U.S. 52 (1926); *Bowsher v. Synar*, 478 U.S. 714 (1986).

This Court held in both *Meyers* and *Bowsher*, that executive powers cannot be entrusted to any officer who is subservient to, or who may be controlled by, the Congress. This view is supported by the language of Article II of the Constitution which does not allow for any diminution of "Executive Power" since all, not some, of that

---

[8] "The Framers of the Federal Constitution . . . viewed the principles of separation of powers as the absolutely central guarantee of a just government: 'Recognizing this, the Court has repeatedly adjudicated separation of powers claims brought by people acting in their individual capacities. (citing cases).' " *United States v. Munoz-Florez*, 495 U.S. 385, 394 (1990).

power is vested in the President. While the Constitution does allow Congress to vest the power to appoint inferior executive officers "in the President alone, or in the courts of law, or in the heads of departments," it does not allow Congress itself to appoint executive officers. This is true even though Congress may appoint its own inferior officers to carry out appropriate legislative functions, and it may define the scope of an appointee's jurisdiction. *Buckley v. Valeo*, 424 U.S. 1 (1976).

Like Petitioner, the Chief Law Enforcement Officers of the Wyoming Sheriff's Association have been pressed into federal executive service by the legislative branch through the Brady Act. The functions that the sheriffs are required to perform are clearly executive in nature. The commands of Congress, through the Brady Act, involve the sheriffs in "administration and enforcement of the public law" prohibited in *Buckley* apart from the constitutionally required procedure of Article II. Therefore, the Petition should also be granted to determine whether 18 U.S.C. § 922(s) must be stricken as a violation of the Appointments Clause and the Separation of Powers Doctrine.

CONCLUSION

The Ninth Circuit is profoundly mistaken in its holding that the Brady Act is a minor imposition on the offices of local and state government. The Brady Act represents exactly the type of federal intrusion into state sovereignty prohibited by the Tenth Amendment. Therefore, *Amicus* submits that the Ninth Circuit's constitutionally antithetical opinion represents bad law, has no place in federal jurisprudence, and merits prompt review.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 25 1996
CLERK

(5)

No. 95-1503

In The

Supreme Court of the United States

October Term, 1995

SHERIFF RICHARD MACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

U.S. District Court
U.S. District Court for the District of Arizona (Tucson)
CIVIL DOCKET FOR CASE # 94-CV-113

Mack v. USA	Filed: 02/28/94
Assigned to: Judge John M. Roll	Nature of suit: 440
Demand: $0000	
Lead Docket: None	Jurisdiction: US Defendant

Cause: 28:1331 Federal Question: Other Civil Rights

RICHARD MACK, Sheriff Graham Co, AZ pla	David T. Hardy Stephen P. Halbrook
UNITED STATES OF AMERICA dft	Don B. Overall, esq. Sandra M. Schraibman

2/28/94	1	COMPLAINT FILED for Declaratory Judgment; prel & perm inj; AND SUMMONS ISSUED
2/28/94	2	MOTION for preliminary injunction by plaintiff
3/23/94	11	RESPONSE by defendant USA to mtn for preliminary injunction by plaintiff
4/4/94	22	DECLARATION by plaintiff Richard Mack
4/6/94	25	REPLY by plaintiff to response to motion for preliminary injunction by plaintiff
4/21/94		LODGED amended complaint by plaintiff

4/21/94	30	NOTICE by plaintiff of suggestion for consolidation of hearing on merits
5/6/94	32	MOTION dismiss amended complaint by defendant USA
5/12/94	34	RESPONSE by plaintiff to motion tc dismiss amended complaint by defendant USA
5/31/94	38	MINUTE ENTRY Judge inits: JMR Court Reporter: Chris Wright. Hearing held. Richard Mack sworn and examined. Court takes under advisement on 5/31/94 the motion for preliminary injunction by plaintiff.
6/28/94	41	ORDER by Judge John M. Roll granting in part the motion for preliminary injunction by plaintiff and the clerk of the court is dir to enter a jdg declaring 18:922(s)(2) to be unconstitutional; defendant USA permanently enjoined from further enforcing 18 USC 922(s)(2); and that case is dismissed
7/13/94	43	MOTION to alter by defendant USA judgment
7/20/94	47	RESPONSE by plaintiff to motion to alter judgment by defendant USA
8/1/94	48	REPLY MEMORANDUM IN SUPPORT by defendant USA to motion to alter by defendant USA judgment
8/24/94	50	ORDER by Judge John M. Roll denying motion to alter by defendant USA judgment
10/21/94	55	NOTICE OF APPEAL by USA from District Court

11/3/94	56	NOTICE OF CROSS APPEAL by plaintiff from District Court
11/22/94	58	REPORTER'S TRANSCRIPT of proceedings on 5/31/94

Declaration of Sheriff Richard Mack
[filed April 4, 1994]

[caption omitted]

Plaintiff Sheriff Richard Mack declares and states:

1. I am sheriff of, and reside in, Graham County, Arizona, having been elected by the citizens of that county in 1988 and since re-elected.

2. The office of sheriff is created by Article 12, §3 of the Constitution of Arizona; its duties are fixed by Arizona Revised Statutes, Title 11; its budget allocations are fixed by the County Board of Supervisors.

3. I am, for purposes of 18 U.S.C. §922(s), the "chief law enforcement officer" of Graham County. Under that statute, I would accordingly be required to make "reasonable" investigation of "available" records to determine if any person purchasing a handgun from a licensed dealer is precluded from receiving or possessing that arm. I was, several weeks ago, advised by the County Attorney that I am indeed obligated to perform the background checks. [see attachment A]. There are to my knowledge 35 licensed firearms dealers in Graham County.

4. I have undertaken background checks of the citizens of Graham County, as required by 18 U.S.C. §922(s), involuntarily and under protest. During the first four weeks, criminal record checks has yet to show a single "hit." The entire effect of 18 U.S.C. §922(s) in this county has been to cause a total and complete waste of time and effort.

5. I can briefly state what records might be relevant to determining whether a person can possess firearms

under State and Federal law. Whether all these are "available," and whether a failure to examine them would be "reasonable" or "unreasonable" within the meaning of the law I cannot guess. The relevant records would include:

NCIC: These records are electronically retrievable at my office. For the most part, however, they only reflect outstanding warrants.

ACJS: These records are also retrievable. They do include records of convictions, but only from Arizona courts. Many residents of Graham County have moved here from out of state. Further, the information required to be submitted under 18 U.S.C. §922(s) does *not* include two of the most important data needed for an accurate search of this system – the social security number and place of birth. Finally, these records would not reflect whether the person has received a restoration of civil rights following conviction. Under Arizona law, civil rights are automatically restored following certain convictions, and in other cases such restoration may be granted by the court.

Relief from disabilities: The Federal law also excludes from its prohibitions persons who have received a "relief from disabilities" from the Treasury Department. I am not sure how this could be determined, but expect it would require long-distance calls to Treasury headquarters in Washington, D.C.

County Court Criminal Records: These could be hand-searched to determine the nature of the offense and whether a non-automatic restoration of civil rights had been granted. The records for Graham County could be researched

in Safford; should the records be found in another county access would require somewhere between one and six hours' driving time each way.

State Hospital Records: The records of the State Hospital, in Phoenix, would be the only state-wide record of persons who have been committed to institutions and are thus forbidden to possess firearms under Federal law. Accessing these would require four hours' driving time; I anticipate the Hospital would refuse to permit examination in any event.

County Court Civil Records: Federal law also prohibits ownership by anyone ever adjudicated a "mental defective", and State law prohibits possession by a person found a danger to himself or to others. To determine if these findings have been made would require examination of county court civil files. As with the county criminal files, this might require anywhere from a few minutes to six hours' driving time in addition to looking up the person's name and, if they are shown, obtaining and examining the civil files.

Military Service Records: Federal law prohibits ownership by any person given a dishonorable discharge. I have no idea as how or of whom I could inquire to determine whether a resident of Graham County had received such a discharge.

Illegal Alien Status: Federal law prohibits ownership by aliens unlawfully in the United States. Again, I have no idea as to how I could make "reasonable" investigation into this possibility.

Drug Use: Federal law prohibits ownership by anyone who is an unlawful user of a controlled substance. "Reasonable" investigation might include access to a wide variety of law enforcement and misdemeanor court records, as well as medical and drug treatment records.

Renunciation of citizenship: Federal law precludes firearms ownership by anyone who has renounced their citizenship. Apart from the possibility that the State Department maintains records on this, I have no idea of how to investigate this unlikely possibility.

6. I received and have reviewed the "Open Letter to State and Local Law Enforcement Officials" which has since been attached to the government's brief. I found that its discussion of 18 U.S.C. §922(s) shed no useful light on what records must be checked to comply with that statute. It tells me that the law "anticipates some minimal effort" to check criminal records, but then suggests in a rural area "little or no research" may be needed. As to other records, it states that I should run down indications from the criminal record search that the person is "possibly an unlawful user of controlled substances or has had mental health problems," and that mental health records could also be searched "if accessible." The Open Letter advises me that every agency "will have to set its own standards" on what is reasonable and available, which is of no aid at all. Frankly, I regard the Open Letter as a Washington bureaucrat's abdication of responsibility rather than as guidance to a law enforcement official who must comply.

7. I am told that the government has argued that "reasonable effort may mean no effort" if I have higher

law enforcement priorities. Based on my inability to get a single "hit" in four weeks of labor, I would regard background checks as the lowest imaginable priority. Standing on the corner and warning random passers-by against drugs might have a greater impact on crime in Graham County; it certainly could not have had less. At the same time, the text of 18 U.S.C. §922(s) seems to require that I perform criminal background checks as the minimum, whether or not I have higher priorities, and this is restated in the Open Letter.

8. Depending upon what is "reasonable" and what records are meant to be "available" under the terms of the law, a background check might require anywhere from a man-hour to several man-days. With 35 licensed firearm dealers in Graham County, I may receive several requests per day. Under 18 U.S.C. §922(s), I am subject to a five-day deadline on each.

9. I have in my office an undersheriff, one detective, a patrol sergeant, and nine deputies for active patrol. These must provide 24 hour law enforcement for 4,500 square miles under my jurisdiction, occupied by 28,000 persons. By my calculation, we average 1.5 deputies on patrol at any given moment, for this entire area. Between the necessity of responding to actual calls, these are hard put to provide routine patrol. Until recently, I performed our Drug Abuse Resistance Education duties myself, simply so that we would not have to take a deputy off patrol to carry it out. If I am now compelled to perform background checks of our residents, it will have to be done by pulling deputies off patrol. For a large department, removing one deputy from patrol may not be a burden.

For the 28,000 residents of Graham County it means an 11% reduction in law enforcement protection.

10. I would not voluntarily undertake the labor mandated for me by 18 U.S.C. §922(s). The Arizona courts have held that a sheriff may not order a deputy to undertake an illegal or unconstitutional act. Two of my deputies have already come forward to indicate that they view the background checks required as an illegal duty and, if assigned to do them, would refuse on the basis of those Arizona rulings. 18 U.S.C. §922(s) thus puts me in the position, should I attempt to delegate the duty to check, of having to initiate disciplinary proceedings against other State employees, and of issuing orders which both I and the deputy agree are illegal.

11. It is necessary to point out that an Arizona county is very much a subordinate of the State, with narrowly limited powers. Under Arizona law a county official is personally liable if he expends county funds without being able to "point to" a provision of State statute authorizing the expenditure. The duties assigned to me by 18 U.S.C. §922(s) have never been accomplished by our sheriffs. We have no mechanism for carrying them, or anything resembling them, out. I have no provision in a budget authorizing the required expenditures. To the extent I do not carry out 18 U.S.C. §922(s), I am personally liable to a criminal prosecution. To the extent I do carry out 18 U.S.C. §922(s), I may be personally and civilly liable. Both these liabilities will arise on February 28, 1994, and continue whether I am in or out of office.

12. In summary, if preliminary relief is not granted I will be harmed by being forced to speculate at my risk

what 18 U.S.C. §922(s) means by a "reasonable" inquiry and "available" records; by being required to perform uncompensated and involuntary labor myself, or undertake legally unjustified disciplinary actions against fellow State employees if I delegate it; and by exposure to a dilemna of personal civil or criminal liability. The citizens of Graham County will be harmed by a significant reduction in patrol strength and the availability of law enforcement personnel for crime prevention and response. None of these harms can be compensated, and all are irreparable once incurred.

I, Sheriff Richard Mack, declare under penalty of perjury that the above is true and correct.

/s/
Sheriff Richard Mack

U.S. Department of Justice [SEAL]

Office of Justice Programs

Bureau of Justice Assistance

[LOGO] **BUREAU OF JUSTICE ASSISTANCE**
Fact Sheet

Fiscal Year 1993 Review of
State Formula Grant Strategies

BUREAU OF JUSTICE ASSISTANCE REVIEW HIGHLIGHTS:

___ All States will comply with local passthrough requirement, with 41 (82 percent) of the States providing more to local units of government than required by statute.

___ States have allocated $42,374,216 more to local units of government than required by statute ($259,554,083 allocated versus $217,179,867 required).

___ Locally implemented projects will receive 65 percent of the formula program funding.

___ Thirty-one States (55.35 percent) are using 5 percent or less of their funds for administration.

___ A total of $26,252,114 has been designated as set-aside for criminal justice records improvement programs.

Introduction

The Edward Byrne Memorial State and Local Law Enforcement Assistance Formula Grant Program, authorized by the Anti-Drug Abuse Act of 1988, is administered by the Bureau of Justice Assistance (BJA), Office of Justice Program (OJP), Department of Justice. This program is designed to assist States and local units of government in carrying out specific programs that offer a high probability of improving the functioning of the criminal justice system. Special emphasis is placed on assisting nationwide and multijurisdictional projects in controlling the drug and violent crime problem, as well as those efforts that are advocated in the National Drug Control Strategy.

In Accordance with Sec. 501(b) of the Act, States may award formula grant funds to State agencies and units of local government to enforce State and local laws that establish offenses similar to offenses established in the Controlled Substances Act (21 U.S.C. 801 *et seq.*) and improve the functioning of the criminal justice system, with emphasis on violent crime and serious offenders. Grants may provide personnel, equipment, training, technical assistance, and information systems for more widespread apprehension, prosecution, adjudication, detention, and rehabilitation of persons who violate such laws and for providing assistance (other than compensation) to the victims of such crimes.

Section 506(a) of the Act requires that at least 80 percent of the total appropriation be allocated for the formula grant program. The appropriation for fiscal year 1993 remained at $473,000,000. After reserving $50,000,000 for discretionary programs, a balance of $423,000,000,

representing 89.42 percent of the total appropriation, remained for the formula grant program. This amount is divided among the 50 States, five Territories, and the District of Columbia. Each entity receives a base amount of 0.25 percent of the total formula allocation of $500,000, whichever is greater (the base amount for fiscal year 1993 was $1,057,500). The remaining funds are allocated on the basis of each State's relative share of the Nation's total population. Although the average allocation was $7,553,571, actual funding ranged from a high of $44,349,000 for California to a low of $1,203,000 for the Virgin Islands. American Samoa and the Northern Mariana Islands are considered as a single unit for funding purposes and receive a total allocation of $1,186,000 (American Samoa – $794,620; Northern Mariana Islands – $391,380).

Application Submission and Review Process

The Anti-Drug Abuse Act of 1988 established specific timeframes by which formula grant funds must be awarded. Within 60 days after the enactment of BJA's annual appropriation, the States are required to submit an application and comprehensive statewide strategy to the BJA. The fiscal year 1993 funding cycle established December 7, 1992, as the deadline for the States' application submission. The legislation also mandates that BJA conduct a full review and approve or deny the application within 45 days of receipt of a State's complete submission. These reviews require multi-level coordination among the offices within OJP to ascertain the State's compliance with regulations and legislative mandates in addition to an indepth assessment of data and compilation of the strategy's information into a summary format (exhibit 1).

EXHIBIT 1

Edward Byrne Memorial State and Local Law Enforcement Assistance Program

Formula Grant Program $423,000,000

State	Allocation	Received	Dir. Signed	Awarded
Alabama	$6,884,000	12/03/92	01/13/93	01/25/93
Alaska	1,870,000	12/07/93	04/09/93	04/19/93
American Samoa	794,620	12/09/92	01/25/93	02/02/93
Arizona	6,401,000	12/02/92	01/13/93	01/25/93
Arkansas	4,438,000	12/14/92	01/28/93	01/28/93
California	44,349,000	12/02/92	01/14/93	01/26/93
Colorado	5,870,000	12/10/92	01/26/93	02/03/93
Connecticut	5,747,000	12/08/92	02/03/93	02/11/93
Delaware	2,027,000	12/09/93	01/25/93	02/02/93
District of Columbia	1,910,000	12/03/93	02/22/93	03/02/93
Florida	19,977,000	12/07/92	01/25/93	02/02/93
Georgia	10,495,000	12/03/92	01/25/93	02/02/93
Guam	1,247,000	12/09/92	06/30/93	07/09/93
Hawaii	2,675,000	12/07/92	02/03/93	02/11/93
Idaho	2,538,000	12/07/92	01/14/93	01/26/93
Illinois	17,506,000	12/07/92	01/15/93	01/27/93
Indiana	9,052,000	12/08/92	02/04/93	02/12/93
Iowa	5,040,000	11/30/92	01/08/93	01/19/93
Kansas	4,613,000	12/08/92	01/11/93	01/21/93
Kentucky	6,349,000	12/07/92	01/28/93	02/05/93
Louisiana	7,117,000	12/02/92	01/08/93	01/19/93
Maine	2,817,000	12/07/92	02/09/93	02/18/93
Maryland	7,983,000	12/09/92	02/17/93	02/25/93
Massachusetts	9,602,000	12/07/92	01/25/93	02/02/93
Michigan	14,407,000	12/11/92	02/17/93	02/25/93
Minnesota	7,373,000	12/04/92	01/25/93	02/02/93
Mississippi	4,751,000	12/07/92	01/26/93	02/03/93
Missouri	8,408,000	12/07/92	01/26/93	02/03/93
Montana	2,209,000	12/07/92	01/27/93	02/04/93
Nebraska	3,328,000	12/07/92	02/17/93	02/25/93
Nevada	2,887,000	12/07/92	02/17/93	02/25/93
New Hampshire	2,632,000	12/08/92	01/14/93	01/26/93
New Jersey	12,115,000	01/08/93	03/04/93	03/12/93
New Mexico	3,283,000	12/08/92	02/22/93	03/02/93
New York	26,790,000	12/10/92	02/11/93	02/22/93
N. Mariana Islands	391,380	12/07/92	04/07/93	04/15/93
North Carolina	10,658,000	11/30/92	01/14/93	01/26/93
North Dakota	1,982,000	12/01/92	01/14/93	01/26/93
Ohio	16,645,000	12/07/92	01/15/93	01/27/93
Oklahoma	5,582,000	12/07/92	02/17/93	02/25/93
Oregon	5,221,000	12/07/93	03/04/93	03/12/93
Pennsylvania	18,102,000	12/09/92	03/02/93	03/10/93
Puerto Rico	6,076,000	12/07/92	01/25/93	02/02/93
Rhode Island	2,488,000	11/30/92	01/14/93	01/23/93
South Carolina	6,130,000	12/01/92	01/27/93	02/04/93
South Dakota	2,059,000	12/02/92	02/03/93	02/11/93
Tennessee	8,115,000	12/10/92	02/03/93	02/11/93
Texas	25,780,000	12/07/92	01/08/93	01/19/93
Utah	3,580,000	12/10/92	02/16/93	02/24/93
Vermont	1,865,000	12/09/92	03/02/93	03/10/93
Virgin Islands	1,203,000	12/03/92	01/15/93	01/27/93
Virginia	10,015,000	12/08/92	01/26/93	02/03/93
Washington	8,208,000	12/08/92	01/19/93	01/28/93
West Virginia	3,624,000	12/09/93	02/03/93	02/11/93
Wisconsin	8,118,000	12/07/92	02/03/93	02/11/93
Wyoming	1,713,000	12/08/92	01/27/93	02/04/93
*TOTAL	$423,000,000			

Although submissions from all 56 entities were reviewed within the required 45-day period, award dates may reflect delays due to incomplete applications.

Key Findings

___ Population fluctuations continue to alter States' allocation.

State population figures, based on the Bureau of Census estimates as of July 1, 1991, revealed significant fluctuations in population, thus altering each State's relative share of the Nation's total population. Because population share is the primary determinant for funding allocations, fifty-five of the entities experienced some variance in funding level for fiscal year 1993. Twenty of the States (35.71 percent) received an increase in funding, which ranged from $7,000 for Delaware to $301,000 for California. Conversely, 35 States (62.50 percent) experienced a decline in funding, with New York encountering the greatest decrease at $256,000. Only Wyoming's funding remained static at $1,713,000 for both fiscal year 1992 and fiscal year 1993 (exhibit 2).

EXHIBIT 2

Comparison of Funding Between Fiscal Years 1992 and 1993

State	FY 1992 Allocation	FY 1993 Allocation	Funding Difference
Alabama	$6,894,000	$6,884,000	-10,000
Alaska	1,852,000	1,870,000	18,000
American Samoa	795,960	794,620	-1,340
Arizona	6,352,000	6,401,000	49,000
Arkansas	4,453,000	4,438,000	-15,000
California	44,048,000	44,349,000	301,000
Colorado	5,817,000	5,870,000	53,000
Connecticut	5,806,000	5,747,000	-59,000
Delaware	2,020,000	2,027,000	7,000
District of Columbia	1,934,000	1,910,000	-24,000
Florida	19,747,000	19,977,000	230,000
Georgia	10,416,000	10,495,000	79,000
Guam	1,250,000	1,247,000	-3,000
Hawaii	2,658,000	2,675,000	17,000
Idaho	2,512,000	2,538,000	26,000
Illinois	17,570,000	17,506,000	-64,000
Indiana	9,066,000	9,052,000	-14,000
Iowa	5,069,000	5,040,000	-29,000
Kansas	4,637,000	4,613,000	-24,000
Kentucky	6,381,000	6,349,000	-32,000
Louisiana	7,154,000	7,117,000	-37,000
Maine	2,831,000	2,817,000	-14,000
Maryland	7,965,000	7,983,000	18,000
Massachusetts	9,749,000	9,602,000	-147,000
Michigan	14,485,000	14,407,000	-78,000
Minnesota	7,378,000	7,373,000	-5,000
Mississippi	4,775,000	4,751,000	-24,000
Missouri	8,449,000	8,408,000	-41,000
Montana	2,212,000	2,209,000	-3,000
Nebraska	3,338,000	3,328,000	-10,000
Nevada	2,794,000	2,887,000	93,000
New Hampshire	2,660,000	2,632,000	-28,000
New Jersey	12,224,000	12,115,000	-109,000
New Mexico	3,246,000	3,263,000	17,000
New York	27,046,000	26,790,000	-25,600
N. Mariana Islands	392,040	391,380	-660
North Carolina	10,663,000	10,658,000	25,000
North Dakota	1,980,000	1,962,000	-18,000
Ohio	16,727,000	16,645,000	-82,000
Oklahoma	5,602,000	5,582,000	-20,000
Oregon	5,163,000	5,221,000	58,000
Pennsylvania	18,221,000	18,102,000	-119,000
Puerto Rico	6,145,000	6,076,000	-6,900
Rhode Island	2,507,000	2,488,000	-19,000
South Carolina	6,094,000	6,130,000	36,000
South Dakota	2,063,000	2,059,000	-4,000
Tennessee	8,103,000	8,115,000	12,000
Texas	25,596,000	25,780,000	184,000
Utah	3,546,000	3,580,000	34,000
Vermont	1,870,000	1,865,000	-5,000
Virgin Islands	1,205,000	1,203,000	-2,000
Virginia	9,996,000	10,015,000	19,000
Washington	8,088,000	8,208,000	120,000
West Virginia	3,648,000	3,624,000	-24,000
Wisconsin	8,124,000	8,118,000	-6,000
Wyoming	1,713,000	1,713,000	0
TOTAL	$423,000,000	$423,000,000	

___ Administrative funding allocations have increased.

Each State or Territory may use up to 10 percent of its allocation for the administration of the grant program. BJA encourages States to use the necessary resources, within the 10 percent, for proper program administration. Analysis indicates a slight increase in the amount of money being used for administration (5.95 percent for fiscal year 1993 versus 5.61 percent for fiscal year 1992).

Thirty-one States (55.35 percent) will use 5 percent or less of their funds for administrative purposes; however, 25 States (44.64 percent) anticipate using up to 10 percent of their allocation for administration. It should be noted that the primary reason for using administrative funds in excess of 5 percent was to support enhanced evaluation and monitoring efforts (exhibits 3 and 4).

EXHIBIT 3

Administrative Funds
Percent of States' Allocation—Fiscal Year 1993

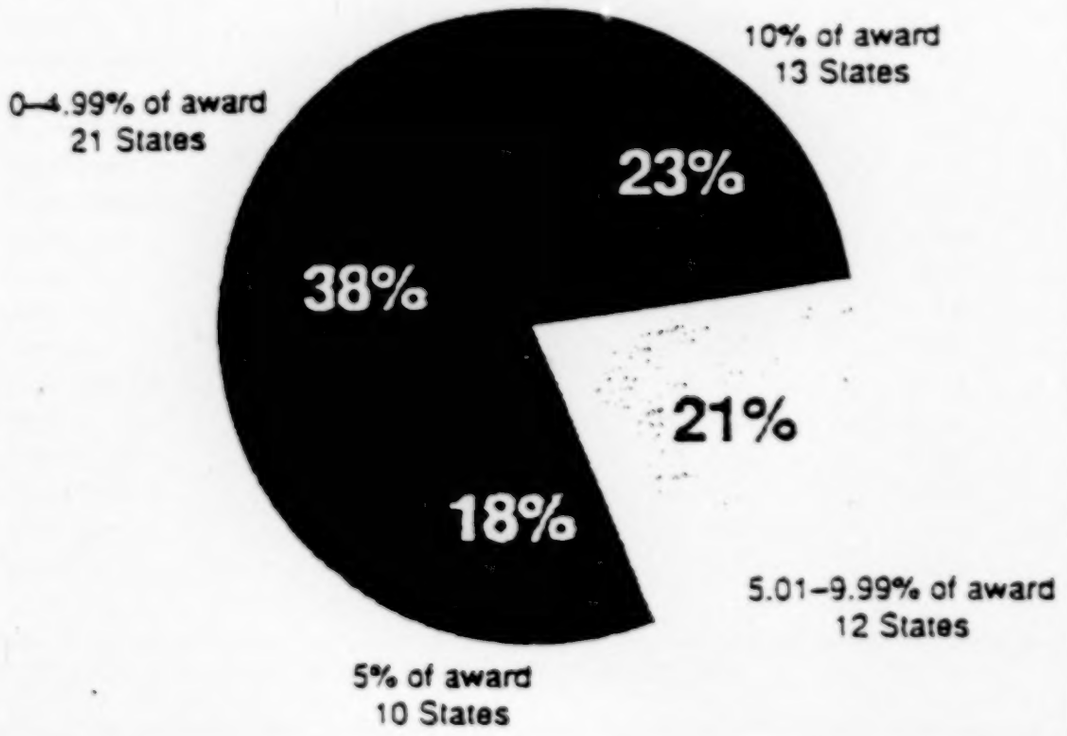


EXHIBIT 4

Drug Control and System Improvement Formula Grant

Fiscal Year 1993
State Allocations and Administrative Funds

State	Allocation	Administrative Funds	Percent Administration
Alabama	$6,884,000	$688,400	10.00
Alaska	1,870,000	187,000	10.00
American Samoa	794,620	79,462	10.00
Arizona	6,401,000	448,070	7.00
Arkansas	4,438,000	162,848	3.67
California	44,349,000	3,104,430	7.00
Colorado	5,870,000	481,340	8.20
Connecticut	5,747,000	197,784	3.44
Delaware	2,027,000	143,250	7.07
District of Columbia	1,910,000	191,000	10.00
Florida	19,977,000	891,151	4.46
Georgia	10,495,000	735,000	7.00
Guam	1,247,000	62,500	5.01
Hawaii	2,675,000	133,750	5.00
Idaho	2,538,000	253,800	10.00
Illinois	17,506,000	875,300	5.00
Indiana	9,052,000	452,600	5.00
Iowa	5,040,000	210,000	4.17
Kansas	4,613,000	90,000	1.95
Kentucky	6,349,000	317,450	5.00
Louisiana	7,117,000	427,020	6.00
Maine	2,817,000	129,957	4.61
Maryland	7,983,000	399,150	5.00
Massachusetts	9,602,000	720,150	7.50
Michigan	14,407,000	407,000	2.83
Minnesota	7,373,000	311,350	4.22
Mississippi	4,751,000	475,100	10.00
Missouri	8,408,000	336,320	4.00
Montana	2,209,000	89,000	4.03
Nebraska	3,328,000	76,500	2.30
Nevada	2,887,000	138,000	4.78
New Hampshire	2,632,000	131,600	5.00
New Jersey	12,115,000	844,285	6.97
New Mexico	3,263,000	326,300	10.00
New York	26,790,000	470,000	1.75
N. Mariana Islands	391,380	39,138	10.00
North Carolina	10,658,060	1,065,800	10.00
North Dakota	1,962,000	98,100	5.00
Ohio	16,645,000	1,182,250	7.10
Oklahoma	5,582,000	279,100	5.00
Oregon	5,221,000	522,100	10.00
Pennsylvania	18,102,000	799,458	4.42
Puerto Rico	6,076,000	303,800	5.00
Rhode Island	2,488,000	124,000	4.98
South Carolina	6,130,000	300,000	4.89
South Dakota	2,059,000	144,130	7.00
Tennessee	8,115,000	210,000	2.59
Texas	25,780,000	1,289,000	5.00
Utah	3,580,000	70,000	1.96
Vermont	1,865,000	70,400	3.77
Virgin Islands	1,203,000	120,300	10.00
Virginia	10,015,000	1,001,500	10.00
Washington	8,208,000	520,040	6.34
West Virginia	3,624,000	362,400	10.00
Wisconsin	8,118,000	257,600	3.17
Wyoming	1,713,000	0	0.00
TOTAL	$423,000,000	$23,745,983	

___ States continue to exceed passthrough requirements.

The statutory variable passthrough is the amount of program allocated funds that must be made available to local units of government. As administrative funds serve both State and local units of government, and expenditures are generally in the same proportion as those program funds, they are subtracted initially from the award, prior to calculating actual dollar amounts to be passed through.

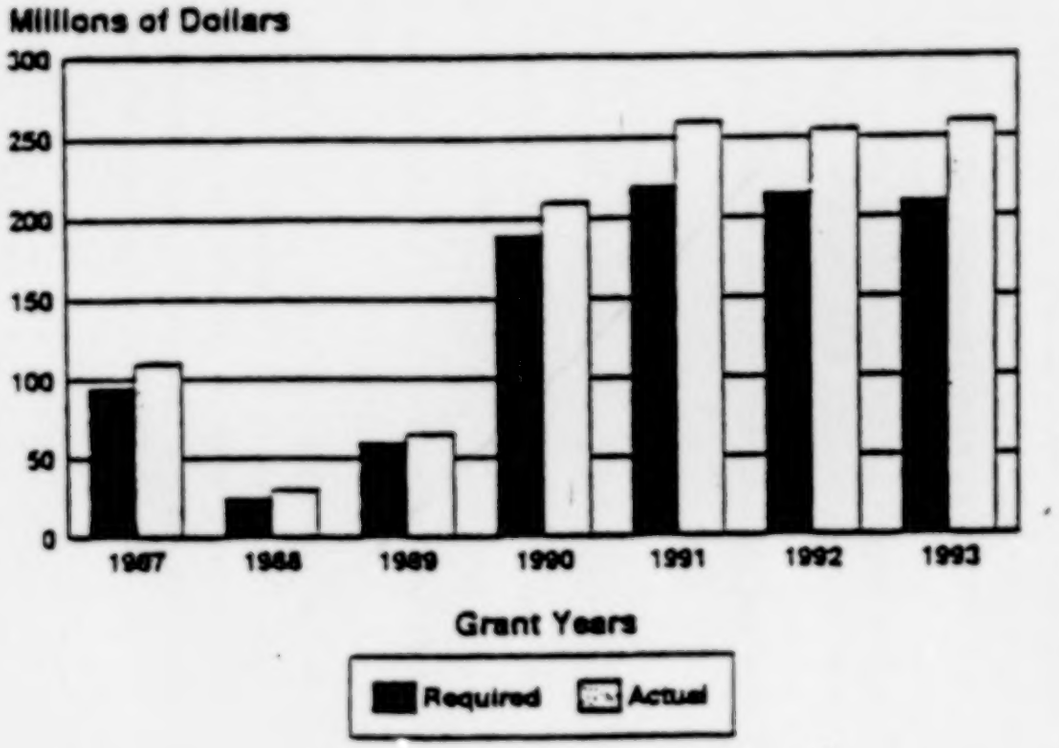
The minimum passthrough amount for each State is based on the percentage of funds expended for criminal justice purposes by local units of government relative to total State and local criminal justice expenditures in the State. These expenditures must be from a government's "own revenue source," e.g., taxes, charges and fees, utility revenue, and interest earnings. However, this requirement applies only to the 50 States. The District of Columbia, because of its designation as a local unit of government, is required to pass through 100 percent of its allocation. The five territories of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands have no passthrough requirement because of their single-level government structure.

Passthrough requirements for the 50 States range from a low of $369,755 (21.97 percent) in Alaska to a high of $4,963,634 (70.29 percent) in Minnesota, with the average being $4,343,597. Although all 50 States will meet the minimal requirement, 41 (82 percent) will surpass their required amount. This is consistent with previous years when States retained less funding for State-level projects and allocated more for projects to local units of government.

Fiscal year 1993 funding required that $217,179,867 be passed through to local jurisdictions, however, the States indicate that they will actually surpass this requirement by $42,374,216,for a total of $259,554,083. These figures indicate that, although States are permitted to retain an average of 45.60 percent of the allocation for the implementation of State-level programs, they are actually using an average of only 35 percent. Thus nationally, the majority of the funding (65 percent) is being used for the implementation of programs to specifically assist local units of government in their war against drugs and violent crime (exhibit 5).

EXHIBIT 5

Variable Passthrough
A Comparison: Required Versus Proposed



- Some states will exceed the 5 percent set-aside for criminal justice records improvement.

The Crime Control Act of 1990 amended the Omnibus Crime Control and Safe Streets Act to require each State receiving Edward Byrne Memorial State and Local Law Enforcement Assistance Formula Grant funds to allocate at least 5 percent of its total award for the improvement of criminal justice records. This requirement, which applied to the fiscal year 1992 and subsequent formula grant awards, is for improvements that include the following:

- Completion of criminal histories to include the final disposition of all arrests for felony offenses.
- Full automation of all criminal justice histories and fingerprint records.
- Frequency and quality of criminal history reports to the Federal Bureau of Investigation.

An analysis of information supplied by the States indicates that, although 38 States (67.85 percent) will minimally comply by setting aside the required 5 percent, 18 States (32.14 percent) intend to surpass this amount, with South Carolina designating up to 18.92 percent (exhibit 6).

EXHIBIT 6

State Allocations for Fiscal Year 1993
Criminal Justice Records Improvement

State	Allocation	Criminal History Allocation	Percent Set Aside
Alabama	$6,884,000	$344,200	5.00
Alaska	1,870,000	93,500	5.00
American Samoa	794,620	52,150	6.56
Arizona	6,401,000	320,050	5.00
Arkansas	4,438,000	221,900	5.00
California	44,349,000	2,217,450	5.00
Colorado	5,870,000	293,500	5.00
Connecticut	5,747,000	287,350	5.00
Delaware	2,027,000	325,000	16.03
District of Columbia	1,910,000	125,000	6.54
Florida	19,977,000	1,268,367	6.35
Georgia	10,495,000	524,750	5.00
Guam	1,247,000	135,000	10.83
Hawaii	2,675,000	133,750	5.00
Idaho	2,538,000	126,900	5.00
Illinois	17,506,000	875,300	5.00
Indiana	9,052,000	452,600	5.00
Iowa	5,040,000	252,000	5.00
Kansas	4,613,000	230,650	5.00
Kentucky	6,349,000	397,450	6.26
Louisiana	7,117,000	568,000	7.98
Maine	2,817,000	269,486	9.57
Maryland	7,983,000	399,150	5.00
Massachusetts	9,602,000	1,500,000	15.62
Michigan	14,407,000	720,350	5.00
Minnesota	7,373,000	368,900	5.00
Mississippi	4,751,000	250,000	5.26
Missouri	8,408,000	420,400	5.00
Montana	2,209,000	180,000	8.15
Nebraska	3,328,000	166,900	5.02
Nevada	2,887,000	144,350	5.00
New Hampshire	2,632,000	131,600	5.00
New Jersey	12,115,000	605,750	5.00
New Mexico	3,263,000	163,000	5.00
New York	26,790,000	1,339,500	5.00
N. Mariana Islands	391,380	19,569	5.00
North Carolina	10,658,000	1,532,900	14.38
North Dakota	1,962,000	98,100	5.00
Ohio	16,645,000	832,250	5.00
Oklahoma	5,582,000	279,100	5.00
Oregon	5,221,000	786,442	15.06
Pennsylvania	18,102,000	905,100	5.00
Puerto Rico	6,076,000	600,000	9.87
Rhode Island	2,488,000	124,400	5.00
South Carolina	6,130,000	1,160,000	18.92
South Dakota	2,059,000	102,950	5.00
Tennessee	8,115,000	405,750	5.00
Texas	25,780,000	1,489,000	5.78
Utah	3,580,000	275,000	7.68
Vermont	1,865,000	93,250	5.00
Virgin Islands	1,203,000	60,150	5.00
Virginia	10,015,000	500,750	5.00
Washington	8,208,000	410,400	5.00
West Virginia	3,624,000	181,200	5.00
Wisconsin	8,118,000	405,900	5.00
Wyoming	1,713,000	85,650	5.00
TOTAL	$423,000,000	$26,252,114	

___ Funding priorities remain relatively constant.

Consistent with the two prior years, fiscal year 1993 proposed priorities indicate that the greatest portion of the monies, $141,877,392 (33.54 percent), will go toward funding multijurisdictional task force activities.

Further analyses of data gathered through anticipated funding (Attachment A/Program List Workplan) and actual funding (Individual Project Reports) reveal that, since fiscal year 1991, States have constantly dedicated larger portions of their allocations to multijurisdictional task force activities, corrections programs, and programs to improve technology, including criminal justice information systems.

[Table Omitted In Printing]

Supreme Court, U.S.
FILED
AUG 16 1996
CLERK

No. 95-1503

In The

Supreme Court of the United States

October Term, 1995

SHERIFF RICHARD MACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether Congress exceeds its Commerce Clause powers when it orders State officials, themselves neither engaged in nor interfering with interstate commerce, to exercise their police powers with regard to commerce.

2. Whether a Federal statute requiring State officials to investigate and pass upon the background of each handgun purchaser can be reconciled with the Tenth Amendment as construed in *New York v. United States*, 505 U.S. 144 (1992), in that it commandeers a State official's labor rather than his policymaking.

PARTIES TO THE PROCEEDING

All parties to this proceeding are reflected in the caption; none have parent entities or subsidiaries.

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The opinion of the United States Court of Appeals is reported as *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995) and is reproduced in the Appendix to the Petition for Certiorari ("App.") at 1. The unpublished order of the Court of Appeals denying the petition for rehearing is reproduced at App. 24. The opinion of the United States District Court is reported as *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994) and is reproduced at App. 26.

JURISDICTION

On September 8, 1995, the Court of Appeals entered judgment upholding the validity of the statutory provisions in question. On December 19, 1995, the Court of Appeals denied Petitioner's petition for rehearing. The Petition for a Writ of Certiorari was filed on March 19, 1996 and granted on June 17, 1996. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, §8 of the Constitution of the United States provides:

> Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States. . . .

Amendment 10 to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Pub. L. 103-159, 107 Stat. 1536 (1993), codified as 18 U.S.C. §§922(s)-(t), 924, 925A, is reproduced in full at App. 51-62.

STATEMENT OF THE CASE

The present case involves constitutional challenges to Pub. L. 103-159, 107 Stat. 1536 (1993) ("Brady Act"), which amended the Gun Control Act of 1968, codified as 18 U.S.C. §§921 *et seq.*

(i) Background to the Statute

The Gun Control Act of 1968 prohibited the receipt of firearms by certain categories of persons, generally including those convicted of certain offenses, undocumented aliens, users of illicit drugs, those who have been the subject of certain mental adjudications, those given dishonorable military discharges, persons who have renounced American citizenship, and those subject to certain domestic restraining orders. 18 U.S.C. §922(g), (n).

Under the 1968 Act, persons engaged in the business of dealing in firearms were required to obtain Federal licenses. 18 U.S.C. §922(a)(1). An individual purchasing a firearm from a Federally-licensed dealer was required to

certify that he or she fell within none of the forbidden categories; the certification was available for inspection by Federal agents, who might bring charges as appropriate. 18 U.S.C. §923(g)(1)(A),(B); 27 C.F.R. §§178.124, 178.161.

(ii) Enactment of the Statute

Concerned that prohibited purchasers were defying these restrictions, the 102d Congress weighed creation of additional barriers. These ultimately took form as H.R. 7, which would have required licensed dealers to notify local police of a handgun sale and make no transfer until seven days had passed. *See* H.R. Rep. No. 103-344 (103d Cong., 1st Sess.) at 13-14 *reprinted* 1993 U.S. Code, Cong. & Admin. News at 1990-91. H.R. 7 thus gave an opportunity for a background check, but imposed no mandate. "No duty is created for the chief of police." H.R. Rep. No. 102-47 (102d Cong., 1st Sess.) at 12.

The voluntary arrangement drew opposition. Sheriffs "might check, they might not check. There is no requirement." 137 Cong. Record H2676 (Daily ed. April 1, 1991) (Rep. Fields). "[W]hy does HR.7 provide for an optional, but not mandatory, background check . . . ?" *Id.* at H2668 (Rep. Vucanovich). "[I]t does not even ensure that a check is done." *Id.* at H2831 (May 8, 1991) (Rep. Ballenger). H.R. 7 failed of passage.

In drafting what became Public Law 103-159, the 103d Congress took a different approach. The resulting statute envisioned an eventual "permanent system" under which handgun purchasers would be checked against an automated Federal database of prohibited buyers. 18 U.S.C. §922(t).

Since Federal officials attested that years would pass before the required Federal database existed,[1] the statute created an "interim system" which relied on State authorities, and unlike H.R. 7 commanded action rather than provided an opportunity. 18 U.S.C. §922(s). The interim system would function until a Federal system became operational, or for a maximum of five years. Under it, local officials would be "required" to perform background checks on each handgun purchaser. H.R. Rep. No. 103-344 at 7, *reprinted as* 1993 U.S. Code, Cong. & Admin. News at 1984. Proposals by Rep. Schiff to make the State role voluntary by changing "shall" to "may" were rejected in subcommittee and committee. *See* H.R. Rep. No. 103-344 at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin. News at 2008-09. When Rep. Schiff attempted to renew his proposal on the floor, the bill's sponsor rejoined, "The mandatory requirement is the right requirement," 139 Cong. Record at H9095 (Daily ed., Nov. 10, 1993) (Rep. Hughes), and the attempt was twice voted down. *Id.* at H9093, H9143-44.

Under the interim system, Federally-licensed firearms dealers are required to send a form giving notice of each proposed handgun sale to their "Chief Law Enforcement Official" (CLEO),[2] a term defined to include State,

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[1] The Attorney General advised Congress that "enormous tasks remain" in creating the Federal system and that "It is a near certainty that a national instant-check system is more than five years away . . . " 139 Cong. Record at S16314 (Daily ed., Nov. 19, 1993). *See also id.* at H9130 (Rep. Schumer).

[2] Under some conditions, the dealer may have alternate modes of compliance available. Forms of compliance applicable to ordinary handguns are: (1) notify the CLEO and wait a

and not Federal, officials. 18 U.S.C. §922(s)(8). The CLEO is in turn required to make a "reasonable effort" to ensure that each purchaser so reported is permitted to receive firearms by all Federal, State, and local laws. 18 U.S.C. §922(s)(2). At minimum, this effort must include research into such Federal databases as the Attorney General may direct. *Id.* Pursuant to this mandate, the Attorney General issued Order No. 1853-94, commanding State CLEOs to consult two Federal databases. 59 Fed. Register 9498 (Feb. 28, 1994).

In the event the information the CLEO obtains proves to be incomplete or unclear – *e.g.*, it reflects a conviction for which the purchaser contends his civil rights have been restored – CLEOs were instructed to refuse approval, shift the burden of going forward to the purchaser, and to require him to prove his legal status.[3]

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maximum of five business days for clearance; (2) verify that the purchaser holds a permit under an appropriate State firearms permit law; or (3) obtain approval through a State system that verifies legal eligibility to purchase. 18 U.S.C. §922(s)(1)(A), (C), (D).

[3] If the buyer wants to contest his/ her status, you can be in the position of shifting the burden of tracking down absolute proof to the buyer. If the buyer can furnish you with criminal disposition records or other documents that establish that he/she is not prohibited from receiving or possessing a handgun, you could then notify the FFL [dealer] that you have withdrawn your objection to the sale.

Bureau of Alcohol, Tobacco and Firearms, "Open Letter to State and Local Law Enforcement Officials," Excerpts of Record on Appeal at 28, reproduced at Appendix to Brief for the United States, *Printz v. United States*, No. 95-1478, at 17a.

If the CLEO found no bar to the purchase, the statute commanded him to destroy the form and any references to it within twenty business days. 18 U.S.C. §922(s)(6)(B). If he found a bar, he must so inform the dealer and, if the purchaser requests, provide a written justification of his findings. 18 U.S.C. §922(s)(6)(C). Should the CLEO err in barring a purchase, the statute creates a Federal cause of action against his jurisdiction for correction and recovery of attorneys' fees. 18 U.S.C. §925A. Any violation of §922(s) is a Federal offense, punishable by up to a year's imprisonment. 18 U.S.C. §924(a)(5).

(iii) Facts

Petitioner Richard Mack is Sheriff, and thus CLEO, of Graham County, Arizona. As Sheriff, he is responsible for maintaining the peace of its 28,000 residents. Joint Appendix ["J.A."] at 4, 8.

The duties of the sheriff are defined by Title 11, Arizona Revised Statutes, J.A. 4, and do not include adjudicatory functions. The sheriff is charged with maintaining the peace, arresting offenders, suppressing riots, attending the courts when danger is apprehended, maintaining the jail, serving process, and conducting search and rescue operations. A.R.S. §11-441. Sheriff Mack's office had never handled duties similar to those imposed by the Federal statute; it had no mechanism for carrying them out and had no budget for their accomplishment. J.A. 9. State law forbids counties to impose regulations on the sale, ownership, or possession of firearms. A.R.S. §13-3108; Op. Ariz. Att'y Gen. No. I78-274.

To the extent Sheriff Mack attempted to perform the Federal duties, he incurred civil liability. Under Arizona law, a county official who expends funds in excess of statutory authority is personally liable for their refund, J.A. 9, in an action which may be brought by any taxpayer. A.R.S. §§11-641, 642.[4] The county had given Sheriff Mack no budget for background checks. J.A. 9.

Sheriff Mack has twelve sworn officers – including nine patrol deputies – to discharge his statutory duties for a 4,500 square mile jurisdiction. J.A. 8. Allowing for special details and leave time, he is able to average 1.5 deputies on patrol at any given time, to cover an area nearly the size of Connecticut. *Id.*

Under the new Federal mandate, Sheriff Mack was obliged to make reasonable attempts to verify that each handgun sold by the county's Federally-licensed dealers was being sold to a lawful purchaser. The work diverted one to two man-hours of effort per day. Appendix to Petition for Certiorari ["App."] 65. In the first three months, Sheriff Mack reviewed eighty to ninety proposed purchases. *Id.* Of these, one proved questionable; the purchaser disputed the finding, contending that his civil rights had been restored following the out-of-state conviction. Sheriff Mack followed the procedure advised, and indicated that the purchaser must provide proof of the restoration. *Id.* The constituent left in anger. *Id.*

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[4] Good faith – even reliance on advice of counsel – is no defense. *Hartford Accident & Indemnity Co. v. Wainscott*, 41 Ariz. 439, 19 P.2d 328 (1933).

Sheriff Mack undertook the labor of background checks only because the Federal statute compelled it. J.A. 9. His constituents subsequently blamed him for wasting county resources on the checks. App. 65-66. Some deputies have refused to assist, citing State rulings which forbid him to discipline employees for refusal to follow unconstitutional orders. J.A. 10.

(iv) Proceedings in the District Court

On February 28, 1993, Sheriff Mack commenced an action in the United States District Court, District of Arizona, invoking its jurisdiction under 28 U.S.C. §1331. He sought declaratory and injunctive relief establishing, *inter alia*,[5] that 18 U.S.C. §922(s) is violative of the Tenth Amendment and exceeds the Article I commerce power insofar as it orders a State official, not restricting or affecting the relevant commerce, to regulate and affect it.

The District Court (Roll, J.), relying upon this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), declared unconstitutional those parts of 18 U.S.C. §922(s) which imposed duties upon State officials. The District Court rejected Federal attempts to distinguish *New York*

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[5] Sheriff Mack also contended that the duties imposed were void for vagueness, and that they violated the Thirteenth Amendment by requiring personal service under pain of law. The Court of Appeals ultimately held the vagueness contention unripe, and that the Thirteenth Amendment was not violated since State servants could avoid involuntary Federal servitude by resigning their office. App. at 16-19. As will be discussed *infra*, the latter conclusion raises its own Tenth Amendment difficulty.

on the claim that *New York* precluded only commandeering of State legislatures or other policymakers, while 18 U.S.C. §922(s) commanded State enforcement of Federally-designated policy:

> True, the Brady Act does not require the state to legislate in order to enforce its provisions. In this respect, however, it is more like the "take title" section of the unconstitutional statute in *New York* which essentially operated on default. This provision was found to be constitutionally defective even though no affirmative action was demanded of the state.

App. 42. The District Court did not strike the entire of §922(s), holding instead that the unconstitutional portion could be severed. App. 46-49.

(v) Proceedings in the Court of Appeals

A divided Court of Appeals reversed the judgment of the District Court holding portions of the statute unconstitutional. The majority disposed of the Commerce Clause issue with a footnote observing that firearms move in and affect interstate commerce. App.5 n.5. It dealt with the Tenth Amendment objection by concluding that *New York* does not bar mandates to enforce, as opposed to enact, designated Federal programs:

> The Brady Act is not the kind of a federal mandate condemned by *New York*, nor does it present the concerns related above. . . . [T]he CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. . . . Instead, they are directed to serve for a temporary period as law

> enforcement functionaries in carrying out a federal program.

App. 12-13. The majority recognized only one limit to the Federal power to commandeer officials: a Congressional mandate might be impermissible if it "stall[ed] state government in its tracks by imposing all-consuming federal duties on the State's employees." App. 14.

In dissent, Judge Fernandez argued that the enforce/enact distinction was inconsistent with *New York*, and that, if such a distinction could be drawn, mandated enforcement would be the *greater* infringement of federalism:

> Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program.

App. 21.

From the Circuit ruling Sheriff Mack petitioned for certiorari on March 19, 1996. This Court granted the petition on June 17, 1996.

SUMMARY OF ARGUMENT

In enacting 18 U.S.C. §922(s), Congress chose to violate Tenth Amendment principles this Court enunciated

in *New York v. United States*, 505 U.S. 144 (1992) (*"New York"*). Concerned over illicit acquisitions of firearms from *Federal* licensees, Congress commanded *State* officials to check *Federal* forms against *Federal* databases and *Federal* restrictions. It commanded Sheriff Mack – a county official with powers limiting to maintaining the peace and enforcing the law – to serve as a Federal adjudicator. *The only compensation for the duty is exposure to civil liability:* should he bar a purchase, Congress granted the prospective buyer a cause of action against his county, with recovery of attorneys' fees. In commandeering the Sheriff's services, Congress placed him in a dilemma between violating Federal law, which requires him to approve or restrict gun purchases, and violating the law of his State, which forbids county officials to regulate firearms acquisition. He faces Federal criminal and civil liability should he fail to undertake the task, and State civil liability should he devote county resources to it.

The Congressional command cannot be justified by reference to caselaw antedating *New York*. This is not a situation where Congress has subjected a State to burdens imposed on the Federal electorate, so that the reactions of the latter offer some measure of protection against excess. Rather, Congress has driven a wedge between the interests of the State official and the electorate: the burden on the public – a undesired delay in consummation of a transaction – stands in inverse relation to the degree to which the State official assumes his burden by dropping his other tasks and complying with the Federal mandate. Nor is this a case where a State adjudicator, having appropriately general jurisdiction, is commanded to apply Federal law in the discharge of his existing duty.

Sheriff Mack is no adjudicator, he holds narrowly-defined powers, and these have never encompassed determinations of the type he is now commanded to make.

The statute at issue clearly fails the standards of *New York*. The enact/enforce distinction drawn by the Circuit below is untenable. 18 U.S.C. §922(s) differs from the statute at issue in *New York* only in that it involves a more striking violation of constitutional norms. The State legislature is not commandeered; its functions are usurped. State officials must follow Congressional commands even if in so doing they violate State law. The people cannot fix the powers of the offices they create, determine the allocation of the resources they provide, or elect any citizen unwilling to carry out whatever duties Congress may have assigned.

If Congress can usurp the role of the State legislature and flatly command State officials to carry out its policies – indeed, to exceed their defined powers and to violate State law – then federalism is not merely impaired: it is dead. The State's residual sovereignty is an empty shell; its legislature cannot command even its own public officials.

ARGUMENT

I

18 U.S.C. §922(s) Violates Principles Of Federalism Underscored By The Tenth Amendment

18 U.S.C. §922(s) invents the post of "Chief Law Enforcement Official," ("CLEO"), specifically defining it to include only those holding State office. Indeed, Congress rejected committee amendments which proposed to have the CLEO's tasks undertaken by Federal employees.

See H.R. Rep. No. 103-344, at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin News at 2008.

The duties of the invented post are onerous. The CLEO must make reasonable efforts to ensure that each purchaser of a handgun from a Federally-licensed dealer is not barred from purchasing by any Federal, State, or local law. 18 U.S.C. §922(s)(2). Merely insuring that a person is not barred from gun ownership under Federal law requires making a determination that he does not fall into any one of eight categories, ranging from persons convicted of a "crime punishable by more than a year's imprisonment" (but excluding those who have received restorations of civil rights or Federal "relief from disabilities") to those with dishonorable military discharges or who have renounced citizenship. 18 U.S.C. §922(g). Where available records leave room for doubt, the CLEO must shift the burden of proof to the purchaser and assess the weight of the documentation he provides.[6] If he errs in denying clearance, Congress has given the rejected buyer a cause of action against his county, with recovery of attorneys' fees. 18 U.S.C. §925A.

Sheriff Mack has but a limited force – averaging 1.5 deputies on patrol at any given time – to maintain the peace in an area nearly the size of Connecticut. J.A. 8. The Federal mandate commandeers one to two man-hours of effort per day from this resource. App. 65. The result has been of no benefit to his office or his county. In three months of compelled effort, his office found exactly one purchase which was even questionable. App. 65-66.

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[6] *See* note 3, *supra*.

This commandeering of State resources, and requirement that they be used in violation of State law, marks an exceptionally clear Tenth Amendment violation. It cannot be justified by reference either to *New York* or to rulings which antedate that decision.

Indeed, to defend the statute at issue the United States must reverse the Tenth Amendment interpretation it espoused in *New York*. There, the United States took pains to distinguish its facts from those of a hypothetical mandate to regulate private activity to Federal specification, contending that the latter would mark a *worse* violation of federalism:

> [C]onstruction of a state-owned facility – although it would require a significant commitment of state resources – is qualitatively different from the implementation of federal policies regulating private activity, which would transform state administrative bodies into 'field offices of the national bureaucracy.' *FERC v. Mississippi*, 456 U.S. at 777.

Brief of the United States, *New York v. United States*, at 36-37. Only two years ago, the United States reiterated this position: compelled State enforcement of Federal law would comprise the archetypical violation of *New York*.[7]

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[7] *See* Reply Brief of the United States, *United States v. Lopez* (No. 93-1260) at 10:

> Under this Court's decision in *New York v. United States, supra*, very different constitutional issues would be presented if Congress imposed statutory requirements or prohibitions directly upon state and local educational officials, or if Congress mandated that state and local governments assume responsibility for the enforcement of federal law.

To defend 18 U.S.C. §922(s), the United States must now contend that forcing States to implement "federal policies regulating private activity" and to "assume responsibility for the enforcement of federal law" are exemplars of federalism and not of its most egregious violation.

A. 18 U.S.C. §922(s) Cannot Be Justified By Reference To Rulings Of This Court Antedating *New York v. United States.*

1. Statutes Equally Burdening States And The Federal Electorate: *Garcia v. San Antonio Metropolitan Transit Authority.*

Pre-*New York* Tenth Amendment case law evolved in two contexts. The first involved coverage of generally applicable Federal legislation, such as that regulating employment. Here the original landmark was *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held minimum wage provisions inapplicable to key State employees.

Usery was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), in which the Court suggested that the political process itself could protect States in the context presented: where the burden imposed by the legislation was equally applicable to the voting citizenry, the electoral process would ensure that it was not oppressive. 469 U.S. at 554.

18 U.S.C. §922(s) plainly falls outside the parameters of *Garcia*. By burdening State and private employers alike, the statute in *Garcia* created a natural alliance of

interests. The dynamics of the statute here instead function to "divide and conquer." Sheriffs are burdened by performing the checks; the electorate is not. Indeed, the public is burdened most severely when the sheriffs *do not* perform the checks: in that event each purchaser must wait the full five business days. The national sovereign aggravated the division of interests by on the one hand commanding the sheriff to withhold approval if records are incomplete, *see* note 3, *supra*, and on the other granting the citizen the right to sue him, and recover attorneys' fees, if he fails to approve a qualified buyer. 18 U.S.C. §925A.

2. Statutes Singling Out States But Offering Constitutionally Valid Alternatives: *Hodel* And *FERC*

In deciding *Garcia* this Court did not rule out substantive limitations on Federal power in contexts other than those presented by a statute equally burdening private parties and the States:

> These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on Federal action affecting the States under the Commerce Clause. *See Coyle v. Oklahoma*, 221 U.S. 559 (1911).

469 U.S. at 556. The reference to *Coyle* – which had rejected Congressional attempts to prevent the relocation of a State capital – suggested what those "affirmative limits" might comprise. *Coyle* remained good law because, unlike the wage and hour law upheld in *Garcia*, the statute invalidated in *Coyle* applied only to a State

government – indeed, it *could* apply only to a State government.

This admonition proved too subtle a caution to restrain Congressional appetites. The second aspect of pre-*New York* case law evolved out of Federal attempts to target State officials for performance of desired Federal services.

For a time, a definitive holding on the Tenth Amendment could be avoided. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), posed a challenge to the Surface Mining Act. That act imposed Federal regulations on coal mining, but excepted those States whose regulatory system met certain Federal standards. The Court found no constitutional violation: imposition of Federal regulations would be justified as Commerce Clause pre-emption and States were afforded this as an alternative to accepting the Federal standards. If a State declined to comply, "the full regulatory burden will be borne by the Federal government." 452 U.S. at 288.

Hodel was quickly followed by *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) ("*FERC*"). The statute at issue was the Public Utilities Regulatory Policy Act ("PURPA"), Pub. L. 95-617, 92 Stat. 3119, which required that State utility commissions implement certain regulations and that they provide certain administrative relief.

A sharply divided Court upheld the requirements against Tenth Amendment attack. Although the statute provided no express exception, the majority noted that States could escape its mandate by withdrawing from

regulating interstate commerce, *i.e.*, electrical power distribution. 456 U.S. at 765.

18 U.S.C. §922(s) stands in sharp contrast to the Surface Mining Act and to PURPA. Here, State officials cannot escape the mandate by accepting Federal pre-emption or by simply withdrawing from regulating the field. Indeed, the Sheriff's county *has been* withdrawn from the field by statute. A.R.S. §13-3108.

3. Statutes Requiring Non-Discriminatory Application By State Adjudicators: *Testa v. Katt* And *FERC*.

In discussing PURPA's requirements that State utilities commissions adjudicate certain disputes, and its establishment of a private cause of action to review certain decisionmaking, the *FERC* majority suggested in *dictum*[8] that the situation might be analogized to that presented by *Testa v. Katt*, 330 U.S. 386 (1947), *see* 456 U.S. at 760. *Testa* had involved a refusal by Rhode Island courts to entertain treble-damage suits under Federal wartime price controls: the State court had treated these as extrajurisdictional "penal statutes" which it need not enforce. *Testa* held that the resulting discrimination against Federal causes of action offended the Supremacy Clause; courts of general jurisdiction by definition decide all legal issues brought before them, and a constitutional

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[8] After discussing the analogy, the majority notes that "it plainly is not necessary" to reach the issue since PURPA allowed the State to escape the mandate by withdrawing from the field. 456 U.S. at 764.

Federal statute is, by virtue of the Supremacy Clause, the "law of the land." *Testa* stressed that the courts involved possessed "adequate and appropriate jurisdiction" under State law to handle this manner of adjudication. 330 U.S. at 394.

Testa posed an exceptional case: a State court which treated Federal law as if it were a foreign statute. Its citation of *Herb v. Pitcairn*, 324 U.S. 117 (1945), by way of contrast, *see* 330 U.S. at 394, underscores the limits of its holding. *Herb* had remanded, for consideration as an independent State ground for decision, the issue of whether the State court had jurisdiction to consider analogous State claims. *Cf. Martinez v. California*, 444 U.S. 277, 283-84 n.7 (1980) (Court has never read *Testa* to require that State courts accept claims under 42 U.S.C. §1983.). The power of the State court, *under State law*, to consider an analogous claim is thus a predicate to applying *Testa*'s rationale.

The *FERC dictum* suggested that *Testa*'s rationale might be applicable to State utility commissions, noting that their role was " 'functionally comparable' to that of a judge," 456 U.S. at 760 n.24, and indeed one holding general jurisdiction, for the utility boards were bound to hear claims by "any interested person." *Id.* at 768. In this view, the "seemingly precise parallel" between PURPA's procedural mandates and existing State process might be sufficient to avert a Tenth Amendment challenge to the statute on its face. 456 U.S. at 769 n.31.

The facts now before the Court stand in striking contrast to those of *FERC*. Under Arizona law, a county is but "a subordinate agency" of the State, *Peters v. Fry*, 71

Ariz. 30, 34, 223 P.2d 176, 178 (1950); its officials possess only those "quite limited" powers affirmatively granted "expressly or by necessary implication" by the state legislature, *Maricopa County v. Black*, 19 Ariz. App. 239, 241, 506 P.2d 279, 281 (1973). The State has long *forbidden* counties to engage in the only relevant adjudication, that of determining who should purchase or possess firearms. A.R.S. §13-3108. The sheriff's powers are defined by statute and do not include adjudication of any type, but are limited to straightforward enforcement functions – arrest and confinement, service of process, search and rescue. A.R.S. §11-441. The Sheriff has never engaged in regulation of the type commanded, and his office has no existing mechanism or budget for handling it. J.A. 9.

Sheriff Mack holds no adjudicatory powers, and neither he nor the county he serves may engage in adjudication of the type at issue here. 18 U.S.C. §922(s) seeks to compel him to engage in a function utterly outside his established purpose – to adjudicate disputes between his constituents and the commands of the Federal sovereign, to document his rationale, and to submit his findings to judicial review. Under *Testa* the Federal sovereign must take State adjudicators as it finds them, respecting the limits of the State's decisionmaking structure. *FERC*, 456 U.S. at 773-74 n.4 (Powell, J. concurring in part and dissenting in part). This Congress did not do.

If Sheriff Mack's established State duty is not "functionally comparable to that of a judge," it bears no relation at all to the duty of a court of general jurisdiction. Such a court is jurisdictionally distinguished by a requirement to take in all litigants and to apply in its entirety the

"law of the land." Such a court is functionally distinguished by its inability to set agenda and priorities: those are, so to speak, already subject to commandeering by litigants. *FERC*, 456 U.S. at 784-85 (O'Connor, J., concurring in part and dissenting in part). In contrast, Sheriff Mack is held accountable by his constituents for the setting of priorities – and in a degree beyond that even of a legislature. For him, the question is not which bill is first reported from committee, but why there was a twenty-minute delay in responding to a burglary in progress.[9]

The rationale of *Testa*, even if extended *per* the *dictum* of *FERC*, is inapplicable here. The official commanded to adjudicate is not an adjudicator, he has no established State power over matters analogous to those at issue, and he lacks both the legal and the functional attributes of a court of general jurisdiction.

B. 18 U.S.C. §922(s) Violates The Parameters Of Federalism As Recognized By This Court In *New York v. United States*.

Congressional attempts to commandeer the resources of other sovereigns did not end with PURPA, and at length the Tenth Amendment issue was inescapably presented by enactment of the "take title" proviso of the Low-Level Radioactive Waste Policy Amendments Act, 42

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[9] Since the filing of this action, a Graham County resident was reported missing and soon thereafter found dead in the desert. Sheriff Mack was promptly subjected to a recall petition based on claims his office had not responded with sufficient speed. In the sheriff's context, accountability for setting of priorities is no abstraction.

U.S.C. §§2021b-2021l. Under that proviso, unless a State made specified provision for disposal of its wastes by compact or construction of facilities, the State would take title to them upon tender.

A 6-3 majority of this Court held the proviso unconstitutional. *New York v. United States*, 505 U.S. 144 (1992). *Garcia* was held inapplicable, "as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." 505 U.S. at 160. Rather, the issue was one of the "affirmative" limits foreshadowed by *Garcia*'s reference to *Coyle*. The Court concluded:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the United States. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty'. . . .
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

505 U.S. at 168.

1. 18 U.S.C. §922(s) Imposes Substantial Duties Upon State Officials, In Violation Of The Tenth Amendment.

18 U.S.C. §922(s) invents the post of "Chief Law Enforcement Official," ("CLEO"), specifically defining it

to include only those holding State office. Indeed, Congress rejected committee amendments which proposed to have the CLEO's tasks undertaken by Federal employees. *See* H.R. Rep. No. 103-344, at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin News at 2008.

The duties of the post are onerous. Merely insuring that a person is not barred from gun ownership under Federal law – 18 U.S.C. §922(g) – requires a determination that he:

> (1) has not been convicted of a crime punishable by more than a year's imprisonment (a term of art defined in 18 U.S.C. §921(a) to exclude, *inter alia*, convictions followed by restoration of civil liberties or Federal "relief from disabilities")
>
> (2) is not a fugitive from justice;
>
> (3) is not an unlawful user of controlled substances;
>
> (4) has never been adjudicated a mental defective or committed;
>
> (5) is not an illegal alien;
>
> (6) has not been given a dishonorable military discharge;
>
> (7) has never renounced his citizenship; and
>
> (8) is not subject to a domestic restraining order.

The Chief Law Enforcement Officer must make all "reasonable" attempts at these determinations each time a handgun is sold. 18 U.S.C. §922(s)(2). Where incomplete records suggest the purchaser "might" be precluded, the

CLEO must shift the burden of proof to the purchaser, ask for documentary evidence and assess its weight.[10]

Sheriff Mack documented the difficulties of compliance. National computer records largely reflect only outstanding warrants, J.A. at 5, while State records do not reflect the civil rights restorations given, often automatically, under State law. *Id.* at 5. If the check is extended beyond criminal records, it becomes all but impossible. Verifying State mental records would require a four-hour drive; ruling out illicit drug use might require checking any number of investigative files; Sheriff Mack can only speculate how he might "reasonably" determine if a person had been dishonorably discharged, was an alien, or had renounced American citizenship. J.A. at 6-7.

The CLEO's duties do not end here. If the results are negative, the CLEO must destroy the request and also "any record containing information derived from the statement. . . . " 18 U.S.C. §922(s)(6)(B). If the results are positive, the CLEO must block the sale and, if requested, serve a written explanation of his action. 18 U.S.C. §922(s)(6)(C). A rejected buyer has a Federal cause of action against the CLEO's employer, with recovery of attorney's fees. 18 U.S.C. §925A.[11]

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[10] *See* note 3, *supra*.

[11] The statute purports to immunize the Sheriff against other civil liability arising from his preventing, or failing to prevent, a person from obtaining a firearm. 18 U.S.C. §922(s)(7). It does not expressly immunize his employing government. *Compare* 18 U.S.C. §922(t)(6) (granting immunity under permanent system both to official and to local government). The Federal grant of immunity, if applicable, may itself exceed

The statute clearly runs afoul of *New York*'s invalidation of the "take title" requirement. Congress can no more command Sheriff Mack to take responsibility for Federally-licensed dealers' transactions than it could command New York authorities to take responsibility for third parties' nuclear scrap. Either schema conflicts with this Court's conclusion that "The Federal Government may not compel the States to enact *or* administer a federal regulatory program." 505 U.S. at 188 (emphasis supplied). *See* Deborah Merritt, *Three Faces of Federalism*, 47 Vand. L. Rev. 1563, 1580 n.65 (1994).

New York predicted that such Federal "commandeering" would undermine the very core of federalism, permitting one sovereign to shift accountability to another: "[I]t may be State officials who bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. at 169. The statute at issue here fulfills that prediction. Sheriff Mack is forced to reallocate scarce resources entrusted to him by his electorate. He is blamed by them for the resulting diversion. App. 65-66. Moreover, when the purchaser disputes the completeness of the records Sheriff Mack is

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constitutional boundaries. Arizona has abandoned sovereign immunity. *See Priichard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990). Issuance of a permit, other than those relating to professions, is actionable if grossly negligent. A.R.S. §12-820.02(5). The State constitution prohibits enactment of laws restricting recovery for wrongful death. Ariz. Const. Art. II §31. An attempt to immunize a State official against a tort claim brought by a State resident, under State law in a State court, poses its own Tenth Amendment concerns.

forced to serve as an adjudicator and to accept the blame for the decision Congress forced him to make. App. 65.

2. The Ninth Circuit's Attempt To Distinguish *New York* Fails.

In creating a federal system, the Framers took comfort in the reflection that "Power [is] almost always the rival of power," *Federalist No. 28* (A. Hamilton), anticipating that "The different governments will control each other, at the same time that each will be controlled by itself." *Federalist No. 51* (J. Madison). To separate each government's line of command, the Framers rejected alike Hamilton's proposals for Federal appointment of governors, Pinckney's call for State enforcement of Federal decisions, and Randolph's proposal for a congressional "negative" upon State law. *See* James Madison, Notes on Debates in the Federal Convention 31, 139 (A. Koch, ed. 1966).

These practical judgments have withstood the hard test of two centuries. They are set at nought by the Circuit decision below. To sustain the statute, the Circuit rewrites the results of 1787, creating Federal powers which far exceed those rejected in the Convention. Rather than a "negative" upon State law, Congress acquires nearly unlimited power to *compel action* to its specification.

The Ninth Circuit attempted to distinguish *New York* on the ground that the statute there at issue sought to mandate policy making in the form of regulation or statute, whereas 18 U.S.C. §922(s) mandates enforcement of

externally-dictated policy. App. 10-12. The distinction drawn is both incorrect and artificial.

An examination of the facts of *New York* demonstrates the untenable nature of the enact/enforce distinction. In briefing *New York*, the United States contended that the statute at issue gave States three alternative modes of compliance, two of which required *no* regulation of private conduct:

> (1) "the simple act" of executing an appropriate compact, which required "no significant regulatory activity whatsoever;"
>
> (2) taking title to the waste and building its own facilities, which would not involve "implementation of federal policies regulating private activity" or
>
> (3) regulating privately-owned storage facilities.

Brief of the United States, *New York v. United States*, No. 91-543, at 34-37. This Court concluded that *none* of the posed alternatives passed Tenth Amendment muster, and in so doing explained quite clearly the breadth of its use of "administer:"

> Respondents emphasize the latitude given to the States to implement Congress' plan. The Act enables the States to regulate pursuant to Congress' instructions in any number of different ways. States may avoid taking title to contracting with sited regional compacts, by building a disposal site alone or as a part of a compact, or by permitting private parties to build a disposal site. . . . This line of reasoning, however, only underscores the critical alternative a State lacks:

> A State may not decline to administer the federal program.

505 U.S. at 176-77. "Administer" was thus clearly used to encompass, not only promulgation of regulations directed at private conduct, but State decisions regarding the use of its own resources.

Unwilling to accept this Court's clear statement of the standard, the Circuit tortures "or administer," arguing that this Court must have meant only " 'administer' in the sense of being in charge of a program and making policy decisions. . . . " App. 11, n.7. The Circuit's gloss is inconsistent with *New York* and, for that matter, with common sense: if the CLEO, who processes the forms, sets the standards, makes the rulings, and is subject to judicial review, is not "in charge" of the program, one can only wonder who is.

The artificial nature of the Circuit's distinction is illustrated by the facts of the present case. Adjudication is as much an aspect of policymaking as is the promulgation of regulations. It involves the ultimate form of accountability: the adjudicator makes not general rules, but concrete decisions announced to parties in conflict. 18 U.S.C. §922(s) requires Sheriff Mack to make rulings regarding his own constituents' rights. When records are ambiguous, as they were in the only computer "hit" he obtained, he is ordered to "shift the burden" to the constituent – to reject the constituent's word on the matter – and to demand evidence and assess what is provided.

Allocation of public resources is likewise a policy function, and here the statute compels the Sheriff and him alone to make the relevant decisions. Beyond the

expressly-mandated research into two Federal record systems, he must decide how much of an inquiry constitutes a "reasonable effort." He and he alone must account to his constituents for consequences of the diversion.

The Circuit's newfound theory of federalism narrows the Tenth Amendment to a geometrical point, an abstraction with location but no dimensions or mass. It opens the way for Congress to pass statutes which allow it to take the credit and delegate the blame. No longer bound by restraints of budget and manpower, Congress is free to expand the powers of the Interstate Commerce Commission, the Federal Trade Commission, or any other chosen agency, by allowing them to conscript State agencies and manpower. It can order Federal lands patrolled by State land agencies, and divert county officials to secure the borders. "As ideas for federal projects grow, but resources lessen, the incentives will grow stronger for Congress to command the state governments to perform federal programs for free." Lipner, *Imposing Federal Business on Officers of the State: What the Tenth Amendment Might Mean*, 57 Geo. Wash. L. Rev. 907, 929 (1989). The Federal sovereign need no longer offer conditional grants-in-aid as inducements to changes in criminal justice programs, highways, or welfare programs; it need no longer contract with States for housing of Federal prisoners or securing of Federal facilities. It has but to command.

The conflict between the Ninth Circuit's ruling and *New York* is absolute. If the Ninth Circuit is correct, then *New York* is wrong: the Federal government *could have*

ordered State officials to take title to the waste and build appropriate disposal sites; that option involved no regulatory decisionmaking save that relating, as here, to the allocation of the State's own resources.

C. 18 U.S.C. §922(s) Presents A Far More Egregious Violation Of Federalism Than Was Present In *New York*.

To the extent 18 U.S.C. §922(s) *could* be distinguished from the statute invalidated in *New York*, it presents a *more serious* violation of the Tenth Amendment norms in terms of accountability, justification, and impact upon federalism.

1. Aggravation Of Misplaced Accountability.

New York's "take title" proviso at least allowed a division of misplaced accountability: any decisions which would be made, *e.g.*, to enter a compact or to site a waste disposal facility, would be shared by the entire legislature. 18 U.S.C. §922(s) hands the sheriff complete and sole responsibility for enforcement; indeed, it thrusts him into face-to-face confrontations with his constituents. The constituent angered at the sheriff's decision to withhold authorization, App. 65, did not blame Congress, nor the State legislature *en masse*: he blamed Richard Mack.

Further, 18 U.S.C. §922(s) presents Sheriff Mack with a far more difficult task of correcting the misplaced accountability. Under the "take title" proviso, it was at least possible for the legislature to explain that the Congress had forced it to take title to the waste: here, Sheriff

Mack must try to explain why a delayed response to a burglary call was somehow due to a Congressional enactment. In *New York*, the misplaced accountability was at least divisible and demonstrable: here it is focused and insidious.

2. Lack Of Process Justification.

In *New York* the United States could at least contend that the statute was a Federal attempt to redress an interstate conflict, undertaken after calls from the States themselves. *See New York*, 505 U.S. at 191-94 (White, J., dissenting). The National Governors' Association had been prominent in the negotiations, and 42 States had already entered into compacts. *Id.* at 190-91. Thus the dissent submitted that the statute was "very much the product of cooperative federalism, in which the States bargained among themselves," *Id.* at 194.

Here, there can be no such claims. 18 U.S.C. §922(s) was the outcome of no compacts, no compromise, no negotiation. §922(s) is a straightforward attempt by the Federal government to force duties upon unwilling officials.

Nor can it be argued that 18 U.S.C. §922(s) represents "a delicate compromise between . . . overburdened States . . . and the rest of the States." 505 U.S. at 200 (White, J., dissenting). The statute affects *only* sales by licensed dealers, and such dealers are generally forbidden to sell to residents of other States. 18 U.S.C. §922(a)(2), (b)(3); 27 C.F.R. §178.124(c)(1), 178.11 "Identification Documents"

(requiring buyer to present identification showing residence).[12]

3. Mandated Violation Of State Law.

The mandate at issue in *New York* went to the State itself, which ultimately commands its agents' legal authorities. Once the State had decided on its mode of compliance, it had all legal authority necessary to do so.

In 18 U.S.C. §922(s), Congress did not address its commands to a sovereign, but to one of the sovereign's servants. Sheriff Mack possesses only the legal authority delegated to him by the people of the State. These have granted him limited authority bearing no relation to the adjudicatory tasks assigned by the Federal statute, and they have specifically forbidden him to undertake the sort of duties that the statute commands.

The ability of the people of a State to constrain the officials they choose and empower is critical to the "full realization of our liberties." Justice William Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). *See also* Feldman & Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 Ariz. St. L.J. 115

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[12] This is not to deny that firearms may flow, illicitly, between States. But §922(s) is not directed at stopping such transfers, which either involve sellers other than licensed dealers, or falsified identification. §922(s) does not cover the former, and is not intended to address the latter: it simply provides for determining whether the person to whom the buyer's identification pertains has a record.

(1988). If Congress can command State officials to act as Federal agents, subject only to the restrictions placed on the national government in 1791, then the protections of the people of the States have since imposed on *their own agents* can be negated by the Supremacy Clause. Under §922(s), the officials of the State – holding offices established, empowered, and funded by its people – are no longer under the command of the State and its people.

4. Dilution Of Essential Checks And Balances.

To the Framers, federalism held value as a means of checking the ambitions of either level of government.

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition toward the general government. The people, by throwing themselves into either scale, will infallibly make it predominate. If their rights are invaded by either, they can make use of the other for redress.

Federalist No. 28 (Hamilton).

18 U.S.C. §922(s) negates this critical balance. The actions of State officials toward their constituents are subject to complete and direct Congressional control. The people are left with neither the advantage of dual sovereignty – two authorities who may compete for their support – nor that of single sovereignty – absolute accountability. Instead they are subject to a single ruler, whose functions are screened behind agents it does not appoint but whose actions it commands.

5. Impairment Of The People's Right To Choose Their Officials.

The "authority of the people of the States to determine the qualifications of their most important governmental offices" is at the core of republican theory. *Gregory v. Ashcroft*, 401 U.S. 452, 463 (1991). "Through the structure of its government, and the character of those who exercise governmental authority, a state defines itself as a sovereign." *Id.* at 460.

In the ruling below, the Ninth Circuit lightly dismissed Sheriff Mack's Thirteenth Amendment claim with the note that a State official may escape compelled services under 18 U.S.C. §922(s) by resigning his office. App. 45. Under this view, Congress may dictate whom the people of the State choose to represent them; those unwilling to labor as Congress may prescribe need not apply. The people of a State may, under *Coyle*, choose their capital, but not they may not choose who fills it.

To the extent that any distinction can be drawn, 18 U.S.C. §922(s) presents an aggravation, not a mitigation, of the Federalism problems presented in *New York*. It is an exceptionally egregious violation of the principles of federalism protected by the Tenth Amendment.

In sum, 18 U.S.C. §922(s) marks a blatant violation of the principles of federalism. The legislatures of the States are not merely commanded; they are supplanted, and orders issued directly to their officials. Those officials in turn are commanded to act in excess of the powers given by the people of the State, and even in defiance of the legislature's commands. The officials are commanded to act without compensation, but with civil liability in the event of error.

The exceptional nature of the constitutional violation is apparent: to defend 18 U.S.C. §922(s) the United States must abandon – indeed, reverse – the Tenth Amendment position it has uniformly advocated before this Court. 18 U.S.C. §922(s) is an egregious violation of the principles of federalism recognized and guaranteed by the Tenth Amendment.

II

The Commerce Power Does Not Justify A Federal Mandate That A State Official, Precluded By Statute From Interfering With Commerce, Regulate Commerce To Federal Specification

18 U.S.C. §922(s) attempts to regulate, not commerce, nor State interference with commerce, but a State official who exercises limited local police powers – indeed, an official whose people have forbidden him to affect the relevant commerce. The command far exceeds Congressional Article I powers.

At the core of the Constitution's apportionment of power was the decision to give the national government powers that were "few and defined," *Federalist No. 45* (Madison), consisting of the "great and aggregate interests" of the new nation. *Federalist No. 10* (Madison).

Among those defined powers was the authority "to regulate commerce . . . among the several States." Art. I, §8. While this power is near-plenary, with "no limitations other than those prescribed in the constitution," *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824), its scope was still restricted to regulation of "commercial intercourse," and only that "among the several states." *Id.* at 189-90.

Exertion of congressional powers over commerce have taken three historic forms: regulation of the channels of commerce, protection of instrumentalities of commerce, and regulation of acts which substantially affect commerce. *United States v. Lopez*, 115 S.Ct. 1624, 1629-30 (1995) (*"Lopez"*). To the extent a State engages in or affects commerce, it is subject to regulation. *Fry v. United States*, 421 U.S. 542, 547-48 (1975) (engaging in commerce through employment); *EEOC v. Wyoming*, 460 U.S. 226, 235 (1983) (same). To the extent it restricts commerce, its acts are subject to Congressional preclusion or pre-emption. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633-34 (1973).

As interstate commerce itself has grown, so have powers over it. But in enacting 18 U.S.C. §922(s) Congress chose to regulate, not commerce, but the States themselves. It issued commands to Sheriff Mack, not on the basis that he or his State were burdening commerce, but on the basis that he was *not* burdening it and that his State had *forbidden* him to do so.

For nearly two centuries, it remained undisputed that the Commerce Clause does not authorize Federal commands that the States regulate commerce. *See District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975), *remanded for consideration of mootness* 431 U.S. 99 (1977) ("We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing nonconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist."). Commerce Clause issues instead revolved around determining the scope within Congress which might regulate private individuals, and that within which the State might not. *See, e.g., Gibbons v.*

Ogden; Houston, East and West Ry. Co. v. United States, 234 U.S. 342 (1914); *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Only in 1975 did an arm of the national government assert authority to command State officials to regulate interstate commerce; the attempt ended when the United States declined to defend it before this Court.

The asserted power arose against the background of an Environmental Protection Agency "veto" and preemption of certain State attempts at Clean Air Act compliance, with consequent imposition of Federal standards. But rather than use Federal resources to enforce the Federal standards, EPA asserted the statutory power to force State agencies to apply them.

The Fourth, Ninth, and District of Columbia Circuits held that such a construction would exceed Commerce Clause powers, and rejected the asserted power. *See State of Maryland v. EPA*, 530 F.2d 215, 227-28 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 837-39 (9th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975).

After this Court granted certiorari, the United States declined to defend the challenged regulations. It instead informed the Court that the EPA would amend portions of the regulations, and that the Administrator "has never asserted any power to compel the State to carry out its governmental responsibilities under an implementation plan," Brief for the Federal Parties, *EPA v. Brown*, No. 75-909, at 20 n.14. The remaining regulations were to be justified, not as a command to the State to regulate private conduct, but as a command to the State to restrict pollution created by its own actions:

> The State is, in either case, subject to federal regulation only to the extent it is responsible for the pollution, and only when its responsibility stems not from mere failure to regulate private activities, but from its ownership and control of the facilities used in the process of contamination of the air. The power asserted by the Administrator is only over the State as polluter, not over the State as State.

Id. at 20. In light of the government's broad retreat, this Court remanded for consideration of mootness. *EPA v. Brown*, 431 U.S. 99 (1977).

The issue, indefensible in 1977, now reappears. It is presented, paradoxically, in the wake of this Court's reiteration that:

> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating State regulation. The Constitution established Congress as a 'superintending authority over the reciprocal trade' among the States, The Federalist No. 42, p. 268 (C. Rossiter, ed. 1961) by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to State governments.

New York, 505 U.S. at 180.

Sheriff Mack's position was, and remains, straightforward: although firearms may flow in interstate commerce, he is not a firearms dealer, but a State official exercising police powers, limited by statute, in Graham

County. He neither engages in nor interferes with interstate commerce when he refuses to supervise Federal firearms licensees. He is not ordered by the State to affect commerce in firearms – in fact, as noted above, the statutes of the State have expressly forbidden him to do so.

The Ninth Circuit here disposed of Commerce Clause concerns with the note that regulation of firearm sales lies within the commerce power, and the statute in question focuses on sales rather than simple possession. App. 5 n.5. The fact that *private citizens* in a State engage in commerce is thus made dispositive of the Congressional power to command officials of that State. If this is good law, then *New York* cannot be: nuclear waste travels in and affects commerce, and thus Congress would have had every right to command States to deal with it. If this is correct, then the Court need not have labored so mightily to sustain the measures at issue in *FERC* and in *Hodel*: the mere fact that residents of Mississippi consume power, and those of Virginia engage in mining, would have justified any mandate Congress issued, or could have issued, to the States. Indeed,

> By such logic, there is no state governmental function which Congress cannot reach and control. . . . The states can be forced to act or not to act, as Congress chooses to define the burden. . . . The traditional remedy of unwilling states, abandonment of the field to direct federal control, is barred.

David Salmon, *The Federalist Principle: Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 Col. J. Environ. L. 290, 326-27 (1976).

The Ninth Circuit majority extends Commerce Clause powers to the point where they "effectively obliterate the distinction between what is national and what is local."

NLRB v. Jones & Laughlin Steel, 301 U.S. at 37. It brings to fruition the fears dismissed by the *FERC* majority.[13] If a State affects commerce, it may be stopped or restricted; if it withdraws from affecting it, it may be commanded to do so. If its official is empowered to undertake the task, so much the better: if not, Congress may simply bestow upon him the authority when it hands him the duty.

III

The Unconstitutional Portions Of 18 U.S.C. §922(s) Cannot Be Severed From The Valid Portions

18 U.S.C. §922(s)'s imposition of duties violates the Tenth Amendment and exceeds Commerce Clause powers. The question remains whether §922(s) falls, or only some severable portion of it.

A. Severance Is Proper Only Where The Constitutional Portion Of A Statute Is Fully Operative And In The Manner In Which The Legislature Intended.

Severability hinges upon a two-part test. *Alaska Airlines v. Brock*, 480 U.S. 678, 684-5 (1987). To be severable,

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[13] The *FERC* dissents suggested that the decision opened the way to Federal control of all State functions; the majority dismissed this as "apocalyptic" and "overstated," since the holding "does not suggest that the federal government may impose conditions on state activities in fields that are not preemptible. . . . " 456 U.S. at 769-70, n.32. If the Ninth Circuit majority is correct, pre-emption is irrelevant: a State's apparatus may be commandeered even if it withdraws from the field.

the stricken provisions must be "functionally independent" of the surviving ones. *United States v. Jackson*, 390 U.S. 570, 586 (1968). Moreover, the statute as severed must function "in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685 (Emphasis the Court's); that is, elimination of the statute's invalid portions must leave "completely unchanged its basic operation." *United States v. Jackson*, 390 U.S. at 586.

B. The Unchallenged Portions Of 18 U.S.C. §922(s) Are Not Fully Operative In The Manner Congress Intended.

Stripped of compulsory background checks, 18 U.S.C. §922(s) becomes a waiting period, coupled with the possibility that the CLEO *may*, if he desires, perform a check. Every licensed dealer in Graham County will be obligated to transmit notices to Sheriff Mack – who may promptly discard them – and every purchaser will wait five days for a determination that will never come. The "program" would still exist, but – as explained below – it would bear little relation to Congressional intent.

1. Severance Would Change The Statute Into A Form Which Congress Refused To Enact.

As discussed *ante*, the 102d Congress *had* considered H.R.7, which provided for a fixed waiting period with optional checks. The proposal approved by the 103d Congress differed enormously from this approach, making the background check mandatory and the waiting period optional, ending the moment the check was performed. Rep. Zimmer explained the impact:

> Two years ago I voted against an earlier version of the Brady bill, which required a 7-day waiting period for handgun purchases with only an optional background check. . . .
>
> The legislation we are voting on today addresses my principal objections to the 1991 Brady bill. The background check is no longer optional and the waiting period will be eliminated as soon as a national instant check system can be implemented.

Id. at 9107-08. The 103d Congress *four times* rejected, in House subcommittee, committee, and on the floor, amendments proposed by Rep. Schiff to make the check optional. *See* H.R. Rep. No. 103-344 at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin. News at 2008-09 (subcommittee and committee action); 139 Cong. Record H9093, H9143-44 (Daily ed., Nov. 10, 1993) (proposed floor amendment and motion to recommit).

2. Severance Would Yield A Statute With Disadvantages Which Congress Did Not Weigh.

Severance assumes that the resulting statute would be a subset of the original; it is inappropriate where severance would "cause results not contemplated or desired by the legislature." *Connally v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902). Two such results are apparent here.

First, a shift from mandatory to voluntary background checks radically alters the cost/benefit balance. On the benefit side, a Federally-imposed voluntary check achieves little. Background checks were always an option

for States which desired to have them; States which do not desire them are unlikely to perform them if they are proclaimed optional.[14] An optional check thus incurs the full burden of a mandatory check (a five-day wait for millions of constituents) while not increasing the benefit sought *vis a vis* that of the status quo. In rejecting H.R.7, Congress showed awareness of this different balance. "This not only penalizes law-abiding citizens, it does not even ensure that a check is done." 137 Cong. Record H2831 (Daily ed. May 8, 1991) (Rep. Ballenger).

Second, the debate over H.R.7 shows that Congress foresaw special disadvantages to non-mandatory background checks. Rep. Staggers complained that the option permitted discrimination: "If in fact you live in a neighborhood that is an Afro-American neighborhood, chances are the police are going to check your records. If you come from an affluent white neighborhood, they probably are not going to find the time . . . " 137 Cong. Record at H2668 (Rep. Staggers) (Daily ed., May 8, 1991). Rep. Ballenger voiced similar concerns. *Id.* at H2831. The potential for discriminatory application was not weighed by the 103d Congress, simply because it had no application to the bill it passed. To sever the statute here leads, not merely to a law with somewhat reduced benefit, but

---

[14] It might be suggested that a severed 18 U.S.C. §922(s) would give an opportunity to State officials who privately desire to perform checks but are frustrated by the refusal of their constituents to give them the power. Yet this approach yields an anomalous result. It seeks to save a portion of the statute from 10th Amendment invalidation by suggesting that its value lies in protecting State officials from the control and oversight of the people of the State.

to a new statute with problems that Congress has not weighed.

3. Severance Would Create A Statute Containing Inconsistencies And Incongruities.

The severed form of the statute would not even be internally consistent. As enacted, the statute's timetables mesh and its exceptions track its commands precisely. If severed, its provisions make little sense indeed:

As Enacted:

(1) Dealer sends form to CLEO and must wait *5 business days* before transferring firearm. 18 U.S.C. §922(s)(1)(A)(ii).

(2) CLEO must investigate purchaser within *5 business days*. 18 U.S.C. §922(s)(2).

> (a) Unless CLEO obtains a "hit," CLEO destroys forms in 20 days. 18 U.S.C. §922(s)(6)(C).
>
> (b) If "hit" results, and is challenged, CLEO must provide rationale in 20 days. 18 U.S.C. §922(s)(6)(B)(i).

Exception: dealer need not send form or wait if State law *requires* an "authorized government official" to *"verify" legality before* transfer. 18 U.S.C. §922(s)(1)(D).

As Severed:

Dealer sends form to CLEO and must wait *5 business days* before transferring firearm. 18 U.S.C. §922(s)(1)(A)(ii).

> Unless CLEO checks and obtains a "hit," CLEO destroys forms in *20 days*. 18 U.S.C. §922(s)(6)(C).

Exception: dealer need not send form or wait if State law *requires* an "authorized government official" to *"verify" legality before* transfer. 18 U.S.C. §922(s)(1)(D).

As severed, the times for the background check and the waiting period no longer tally; the only time limit on the check is the document destruction deadline of 20 days, yet the dealer may transfer the gun within five.

As severed, the exception does not track the rule. Under the statute as enacted, a State gains exemption from a mandatory check by creating its own mandatory check. As severed, the statute would require only an *optional* check, yet to gain exception the State must have a *mandatory* one; thus a State could have legal requirements *stricter* than the Federal plan (*i.e.*, a 15 day wait with optional checks) yet find it *did not qualify*: its CLEOs must still be served with forms despite the fact that another official has been assigned to perform the voluntary checks. Whether Congress would have enacted a bill with these incongruities is for it alone to decide.

Mandatory background checks, the core of §922(s), are constitutionally void. Severance creates, not a subset of the legislation, but a complete substitute, and one with incongruities and disadvantages Congress never had reason to weigh. 18 U.S.C. §922(s) cannot be severed; it falls as a whole.

CONCLUSION

18 U.S.C. §922(s) exceeds Commerce Clause powers delegated by the people to Congress, and violates the principles of federalism given voice in the Tenth Amendment. The offending portions cannot be stricken without creating a statute Congress declined to pass, and which contains unique disadvantages and incongruities. We respectfully submit that the Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit and hold 18 U.S.C. §922(s) invalid in its entirety.

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Supreme Court, U.S.
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Nos. 95-1478 and 95-1503

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAY PRINTZ, SHERIFF/CORONER, RAVALLI COUNTY, MONTANA, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD MACK, SHERIFF, GRAHAM COUNTY, PETITIONER

v.

UNITED STATES OF AMERICA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Brady Handgun Violence Prevention Act (Brady Act) provides that, within five business days of a firearms dealer's proposal to transfer a handgun, the "chief law enforcement officer" (CLEO) of the transferee's residence shall make a "reasonable effort" to determine whether the transferee's receipt or possession of the handgun would be illegal. 18 U.S.C. 922(s)(2). If the CLEO determines that the transferee's receipt or possession of the handgun would not be illegal, the CLEO shall destroy the records relating to the transfer. 18 U.S.C. 922(s)(6)(B)(i). If the CLEO determines that the receipt or possession of the gun would be illegal, he shall, upon request by the transferee, provide in writing the reason for his determination. 18 U.S.C. 922(s)(6)(C).

The question presented is whether those provisions of the Brady Act exceed Congress's power under the Commerce Clause or contravene constitutional principles of federalism embodied in the Tenth Amendment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a)[1] is reported at 66 F.3d 1025. The opinion of the district court in *Printz* v. *United States* (Pet. App. 30a-66a) is reported at 854 F. Supp. 1503. The opinion of the district court in *Mack* v. *United States* (95-1503 Pet. App. 26-50) is reported at 856 F. Supp. 1372.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 95-1478. "U.S. Resp. App." refers to the appendix to the United States' response to that petition.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1995. Petitions for rehearing were denied on December 19, 1995. Pet. App. 28a-29a. Petitions for a writ of certiorari were filed on March 15, 1996 (No. 95-1478) and March 18, 1996 (No. 95-1503), and were granted on June 17, 1996. 116 S. Ct. 2521. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause (Art. I, § 8, Cl. 3) and the Tenth Amendment of the United States Constitution are reproduced at Pet. App. 75a. The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536, is reproduced at Pet. App. 75a-93a.

Section 928 of Title 18, United States Code, provides: "If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby."

STATEMENT

1. a. The Gun Control Act of 1968 (GCA), 18 U.S.C. 921 *et seq.*, establishes a comprehensive federal scheme governing the manufacture, importation, and distribution of firearms in interstate commerce. Under the GCA, no person without a federal license may make or sell firearms, 18 U.S.C. 922(a)(1)(A), and the conditions under which firearms may be made and sold are subject to detailed regulation.

The GCA makes it unlawful for certain persons, such as convicted felons, to receive or possess firearms in or affecting interstate commerce. 18 U.S.C. 922(g). It is also unlawful for any person to transfer a firearm to another, knowing that the transferee is prohibited by Section 922(g) from receiving or possessing a firearm. 18 U.S.C. 922(d). The GCA further prohibits federally licensed firearms dealers from transferring a firearm to anyone who is less than 18 years old, who does not reside in the dealer's State, or who would be prohibited by state or local law from purchasing or possessing a firearm. 18 U.S.C. 922(b)(1)-(3).[2]

In the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (1993) (Brady Act or Act), Congress amended the GCA to address the national "epidemic of gun violence" by enhancing enforcement of existing federal regulation of gun dealers. See H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993) (House Report); *id.* at 9 (noting that, despite existing federal prohibitions on gun transfers by firearms dealers, a "major source of criminals' guns are gun shops"). The Act requires the Attorney General to establish a national instant criminal background check system by November 30, 1998. 18 U.S.C. 922 note. Once that system is in place, firearms dealers will be required (with certain exceptions) to contact it to determine whether any legal impediment exists to the sale

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[2] Since petitioners' opening briefs were filed, an amendment to the GCA has added, to the categories of persons not permitted by federal law to receive guns, those convicted of certain misdemeanor offenses, having as an element the use or attempted use of physical force or threatened use of a deadly weapon, committed by the spouse, domestic partner, parent, or guardian of the victim. Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, § 101(f), Tit. VI, § 658 (110 Stat. 3009) (Sept. 30, 1996); see 142 Cong. Rec. H11,743 (daily ed. Sept. 28, 1996).

of a firearm. 18 U.S.C. 922(t)(1)(A). Under the national instant check system, the transfer may go forward only if the system verifies that the transferee's receipt of the gun would not be illegal, or if three business days elapse after the dealer contacts the system. 18 U.S.C. 922(t)(1)(B) and (t)(2).

Because the national instant check system may not be fully operative until late 1998, Congress also enacted interim provisions to enhance enforcement of the GCA's transfer restrictions. See House Report 10. The interim provisions, which are the subject of this case, operate in relation to proposed transfers of handguns by federally licensed firearms dealers. Under the interim provisions, a firearms dealer who proposes to transfer a handgun must provide the "chief law enforcement officer" (CLEO) of the transferee's residence with information about the proposed transfer. 18 U.S.C. 922(s)(1)(A). The dealer may not make the transfer until five business days have elapsed after providing such notice to the CLEO, unless, within that five-day period, the CLEO informs the dealer that the CLEO has no information that the transferee's receipt of a handgun would be illegal. See 18 U.S.C. 922(s)(1)(A)(ii)(II). The transfer may go forward after five business days if the dealer receives no information from the CLEO at all. See 18 U.S.C. 922(s)(1)(A)(ii)(I).[3]

To enable CLEOs to determine whether transfer of a handgun would be illegal, prospective handgun purchasers must provide firearms dealers with their name, address,

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[3] The Brady Act defines the "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. 922(s)(8). The Brady Act's interim provisions do not apply in States and Territories that have their own background check requirements. 18 U.S.C. 922(s)(1)(C) and (D); see 59 Fed. Reg. 37,532, 37,534 (1994) (Bureau of Alcohol, Tobacco, and Firearms (ATF) identification of exempt jurisdictions).

and date of birth. 18 U.S.C. 922(s)(1)(A)(i)(I) and (s)(3)(A). The dealer must then give that information to the CLEO. 18 U.S.C. 922(s)(1)(A)(i)(III) and (IV).[4] During the ensuing five-day waiting period, the CLEO "shall make a reasonable effort" to determine whether a legal impediment exists to the proposed sale:

> A chief law enforcement officer to whom a transferor has provided notice * * * shall make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. 922(s)(2). It is that provision for a "reasonable effort to ascertain" whether receipt or possession of the handgun would be illegal to which petitioners principally object.

The Act imposes two further administrative obligations on CLEOs who undertake record checks pursuant to Section 922(s)(2). If the CLEO determines that the receipt of the handgun by the transferee would be illegal, he must, upon request, provide the would-be purchaser with his reasons for that conclusion in writing. 18 U.S.C. 922(s)(6)(C). If, on the other hand, the CLEO does not conclude that the transfer would be illegal, he must destroy the records relating to the transfer. 18 U.S.C. 922(s)(6)(B)(i). The Act does not, however, require that a CLEO notify the dealer (or otherwise act to prevent the transfer of a handgun)

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[4] ATF has also provided, by regulation, that dealers may request additional, optional information of the transferee (such as the transferee's height, weight, place of birth, and social security number) to reduce the chances of an erroneous identification of the transferee. See 59 Fed. Reg. 7110 (1994); 27 C.F.R. 178.130(a)(2).

even if the CLEO concludes that the purchaser's receipt of the gun would be illegal.

The Act provides CLEOs with immunity from damages actions for failing to prevent an unlawful handgun sale, or for mistakenly concluding that a transfer would be contrary to law. 18 U.S.C. 922(s)(7). In addition, although the Brady Act establishes criminal penalties for knowing violations of the Act, see 18 U.S.C. 924(a)(5), the Department of Justice has concluded that those criminal sanctions do not apply to CLEOs who fail to abide by Section 922(s)(2). See Pet. App. 18a-19a.

b. Shortly after enactment of the Brady Act, the Bureau of Alcohol, Tobacco and Firearms (ATF), which is charged with interpretation and implementation of the GCA (see 18 U.S.C. 926; 37 Fed. Reg. 11,696-11,697 (1972)), issued an open letter providing guidance to CLEOs on the "reasonable effort" provision of the Brady Act. See U.S. Resp. App. 13a-17a. ATF made clear that, while the Brady Act generally "anticipates some minimal effort to check commonly available records," CLEOs are not obliged to check "every conceivable record system that may contain information relating to categories of prohibited persons." *Id.* at 13a-14a. ATF further stated that, since the "vast majority of [disqualified] persons * * * are prohibited by virtue of some criminal background," a CLEO's reasonable effort should normally focus on "[c]riminal record systems." *Id.* at 14a. ATF also suggested that, in States with centralized mental health records, those records "could also be searched if accessible." *Ibid.*

ATF explained that, since CLEOs themselves are in the "best position to determine" what constitutes a "reasonable effort," "[e]ach * * * CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction."

U.S. Resp. App. 14a-15a. ATF noted finally that, in some circumstances, as when a CLEO has personal knowledge of a gun purchaser, a CLEO may legitimately decide that it is "reasonable" to do no research at all. *Id.* at 14a.

2. a. Petitioner Printz is the Sheriff of Ravalli County, Montana. Pet. App. 4a. He brought suit in district court, contending that several of the Brady Act's interim requirements, including the requirement that he make a "reasonable effort" to ascertain if there is a legal impediment to a handgun sale, violate the Tenth Amendment. *Id.* at 32a. The district court held that the "reasonable effort" requirement violates the Tenth Amendment. *Id.* at 66a. It also concluded, however, that CLEOs' other obligations under the Act do not contravene the Tenth Amendment. *Id.* at 61a-63a. The court held further that the "reasonable effort" provision is severable from the remainder of the Brady Act, including the Act's five-day waiting period for handgun sales. *Id.* at 66a.

b. Petitioner Mack is the Sheriff of Graham County, Arizona. 95-1503 Pet. App. 3. He also brought suit in district court, contending, as did Sheriff Printz, that the Brady Act's interim requirements for CLEOs contravene the Tenth Amendment. *Id.* at 3, 47-48 n.11. The district court held that the "reasonable effort" requirement contravenes the Tenth Amendment. *Id.* at 43. It also ruled, however, that the record check provision is severable from the remainder of the Act, including the five-day waiting period. *Id.* at 49.[5]

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[5] Both petitioners also contended that the Brady Act's provision for criminal penalties for knowing violations of Section 922(s) (see 18 U.S.C. 924(a)(5)), violates the Due Process Clause of the Fifth Amendment as applied to them. Pet. App. 18a. The court of appeals held (*id.* at 19a) that petitioners' due process claim was not ripe for review because, in light of the Department of Justice's official conclusion that Section 924(a)(5) does not apply to CLEOs (see p. 6,

c. A divided panel of the court of appeals upheld all the challenged provisions. Pet. App. 1a-25a. The court concluded that the Brady Act does not transgress any "implied limitation on federal power" (*id.* at 8a), and that there is "nothing unusually jarring to our system of federalism" in the challenged provisions (*id.* at 9a). The court noted that this Court has rejected the argument that "Congress has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it," as "not representative of the law today." *Ibid.* (quoting *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982)).

The court of appeals rejected in particular petitioners' contention that, under *New York* v. *United States*, 505 U.S. 144 (1992), "the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program." Pet. App. 10a. The court explained that "[t]he constitutional evil that *New York* addressed" was that "the federal government was attempting to direct the States to enact their own legislation or regulations according to a federal formula." *Ibid.* That Tenth Amendment concern, the court explained, is focused on "federal coercion of a State's enactment of legislation or regulations or creation of an administrative program," because such coercion infringes the States' sovereign authority to set policy and undermines political accountability. *Id.* at 13a. "When the federal government requires the States to enact legislation, the enacted legislation is *state* legislation. Thus, it will likely 'be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.'" *Ibid.* (quoting *New York*, 505 U.S. at 169).

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supra), petitioners do not face a credible threat of prosecution. Petitioners have not renewed their due process claim in this Court.

The court concluded that the Brady Act "is not the kind of a federal mandate condemned by *New York*." Pet. App. 14a. It stressed that CLEOs "are not being commanded to engage in the central sovereign processes of enacting legislation or regulations" and "are not even being asked to produce a state policy, for which the state must bear political accountability." *Ibid.* Moreover, it stated, CLEOs' duties under the Act "represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials." *Ibid.*

Although the court assumed that "there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment," it nonetheless concluded that "the Brady Act does not approach that point." Pet. App. 15a. The court observed that petitioners have not been subjected to any requirement to do more "than check computer records" (*id.* at 15a-16a), and it stated that, on the record before it, it "[could not] conclude that 'a reasonable effort' inevitably requires more than [a] minimum for [petitioners]. To perform such computer checks * * * has not been shown to constitute the kind of interference with state functions that would raise Tenth Amendment concerns." *Id.* at 16a.[6]

SUMMARY OF ARGUMENT

I. A. In the Brady Act, Congress responded to a national epidemic of handgun violence by enhancing federal regulation of firearms dealers and federal restrictions on transfers of firearms. The policies of the Brady Act under challenge here involve simple record checks to determine

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[6] Judge Fernandez dissented in part. Pet. App. 22a-25a. He would have held unconstitutional the Brady Act's interim provisions challenged in this case. See *ibid.*

whether a transfer of a handgun would be unlawful, and a waiting period during which those checks can take place. The federal government is clearly responsible for the policy choices made in the Brady Act, as it was responsible for establishing, in the Gun Control Act of 1968, the categories of persons to whom firearms may not be transferred.

The Brady Act does not require the States to add anything in the way of policy to those choices made by the federal government, or otherwise to devise a solution to the problem of gun violence. Rather, the Brady Act calls on local officials, with the most ready access to the most relevant records, to give modest assistance in the implementation of the federal regulation of gun transfers between private parties by conducting the needed record checks. That assistance is temporary; by 1999, the federal government is required to have in place its own machinery for conducting the necessary checks.

The interim, limited, and nonpolicymaking participation by local officials in the Brady Act contravenes no constitutional principle of federalism. The interim provisions challenged here do not alter the fundamentally federal character of the approach devised by Congress and do not contravene the Commerce Clause or the Tenth Amendment. The Court has never held that Congress is absolutely barred from requiring local officials to assist in the application of federal law to private parties. In *Testa* v. *Katt*, 330 U.S. 386 (1947), and *FERC* v. *Mississippi*, 456 U.S. 742 (1982), this Court made clear that state officeholders may be required to apply federal law to private persons.

New York v. *United States*, 505 U.S. 144 (1992), did not alter those established principles. In the statute under review in *New York*, Congress identified a national problem, the disposal of radioactive waste, but failed to enact a

federal solution. Rather, Congress required that the States devise solutions to that national problem, either by legislating their own solutions to the problem of radioactive waste, or by taking title to the waste and then devising an administrative system for its proper disposition. In that case, Congress commandeered the legislative and administrative policymaking apparatus of the States. That commandeering, the Court held, contravened the constitutional values of federalism by blurring the political accountability of elected officials to the people.

Although, under *New York*, Congress may not identify a national problem and then require the States to devise solutions, there is no constitutional rule preventing Congress from devising a national solution and then requiring limited local assistance in what is otherwise a comprehensive federal implementation of that solution. The Framers of the Constitution contemplated that the national government would make use of state officers to carry out some federal laws regulating private parties, including the collection of federal taxes. The early Congresses acted on that understanding when they required state officials to conduct administrative tasks involving registration of aliens. Later Congresses also imposed administrative obligations on state officials in other contexts, including immigration and draft registration. In the present day, several federal statutes require state and local participation in the administration of federal law, especially in the collection, reporting, and dissemination of information. These examples demonstrate that Congress may, from time to time, find it necessary and proper to enlist local officials in limited, nonpolicymaking aspects of the implementation of federal law. There is no historical evidence for any suggestion that this authority is likely to be abused by Congress as a means to undermine the functioning of the States.

B. The Brady Act does not contravene any other limit on the exercise of federal power that might be found in the structure of federalism. The text of the Brady Act requires only that CLEOs make a "reasonable effort" to conduct the record check, and the Act affords CLEOs broad discretion to determine the scope of that "reasonable effort," in light of their own resources and law enforcement priorities. The Bureau of Alcohol, Tobacco and Firearms, which administers the Brady Act, has made clear in its guidance interpreting the Act that it is generally "reasonable" for CLEOs to choose to fulfill their duties by consulting readily accessible criminal records. Thus, in light of their limited resources and competing obligations, CLEOs can and do meet their obligations by having clerical personnel perform checks of criminal records to the extent possible given the circumstances. The other requirements imposed on CLEOs under the Act are even more clearly *de minimis*.

C. The Commerce Clause provides no independent basis for a constitutional challenge to the Brady Act. The inquiries under the Commerce Clause and the Tenth Amendment are mirror images of each other. The commercial transfer of handguns and the possession of handguns in and affecting commerce are both within Congress's power to regulate, and the Brady Act addresses those matters. Record checks by CLEOs are reasonable means developed by Congress to regulate those aspects of commerce.

II. If this Court holds any of the challenged Brady Act provisions unconstitutional, it should not also invalidate the five-day waiting period imposed on firearms dealers, the dealers' obligation to provide information about transferees to the CLEOs, or the CLEOs' obligation to inform transferees of their reasons for preventing a transfer. The severability of the first two provisions is not before

the Court, because petitioners lack standing to challenge them.

In any event, all the challenged provisions of the Brady Act are severable from the rest of the Act. Without the provisions under constitutional challenge in this case, the remainder of the Brady Act would be fully operative as a law, and severing invalid parts of the Brady Act would be consistent with Congress's purpose of addressing gun violence by enhancing restrictions on gun transfers through record checks. Even if this Court invalidates the requirement that CLEOs conduct record checks, retaining the five-day waiting period and firearms dealers' obligation to inform CLEOs about proposed gun transfers will ensure that local officials will be informed about pending handgun transfers, and will have the time and information to conduct record checks if they choose to do so. The CLEO's duty to inform transferees, upon request, why a proposed transfer has been found to be illegal, would in effect be voluntary, because it would be undertaken only if the CLEO chose to conduct the record check.

ARGUMENT

I. THE INTERIM DUTIES OF CHIEF LAW ENFORCEMENT OFFICERS UNDER THE BRADY ACT ARE CONSISTENT WITH CONSTITUTIONAL PRINCIPLES OF FEDERALISM

A. Congress May Require Local Officials To Give Non-Policymaking Assistance In The Application Of Federal Laws To Private Persons

The Brady Act amends the Gun Control Act to enhance already existing federal restrictions on the transfer of handguns between private persons. Enacted by Congress and signed by the President after years of highly publicized debate, the Brady Act sets forth a federal solution to

a national problem, accompanied by federal funding and administered by the federal Bureau of Alcohol, Tobacco and Firearms (ATF). The principal policies of the Brady Act challenged in this case—staying the transfer of a handgun in or affecting commerce pending a limited record check—are readily identifiable as the policies of the national government.

The interim provisions challenged here require temporary, limited, non-policymaking assistance by CLEOs in giving effect to the federal scheme pending the establishment of a national instant background check system. The primary requirement under challenge requires that, during the interim period, CLEOs make a "reasonable effort" to ascertain, by consulting "available" records, whether a legal impediment exists to a proposed handgun sale. 18 U.S.C. 922(s)(2). The CLEOs are not required to establish any new legal restrictions on handgun transfers, but only to ascertain whether an already existing restriction is applicable to a particular case.

Petitioners characterize the burden imposed by this provision in various ways, but, at bottom, their contention does not turn on the nature of the duty created by the Brady Act, the degree of its supposed intrusion onto the functioning of their offices, or the extent to which it requires them to expend resources. Rather, their position is that Congress may not, under any circumstances and to any degree, require local officials to assist in the application of federal law to private persons, unless that requirement is imposed as a condition on the receipt of federal funds. That absolutist position finds no basis in this Court's jurisprudence of federalism or in the constitutional tradition that it reflects.

1. This Court's Decisions Establish That State And Local Officials May Be Required To Apply Federal Law To Private Persons

a. It is clear beyond dispute that constitutional principles of federalism are not violated merely because Congress requires state and local officials to perform a function under federal law. "[T]here are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." *FERC* v. *Mississippi*, 456 U.S. 742, 761-762 (1982); see *South Carolina* v. *Baker*, 485 U.S. 505, 513-515 (1988). Article VI of the Constitution establishes that state and local executive officials may be required to carry out federal obligations, as well as duties imposed by the laws of their own jurisdiction. See *South Carolina* v. *Baker*, 485 U.S. at 514-515; Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1028-1030 (1995). And that is true even if the congressional mandate imposes significant financial burdens on the local governmental entity. See, *e.g.*, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

To the extent that federalism cabins Congress's ability to impose duties under federal law on local officials, the limits must therefore be found in the particular interest recognized in the Tenth Amendment, the protection of liberty through political accountability of public officials to the people. See *New York* v. *United States*, 505 U.S. 144, 181-183 (1992). Further, the nature of the specific obligation imposed by Congress must be closely examined to determine whether the federal obligation impairs that interest in a serious and substantial way. Cf. *South Carolina* v. *Baker*, 485 U.S. at 529 (Rehnquist, C.J., concurring

in the judgment) (noting that principles of federalism are violated only if congressional action "operate[s] to directly displace the States' freedom to structure integral operations").

A constitutional problem exists when Congress, although identifying a national problem, chooses not to enact any federal solution but compels the States to devise their own regulatory approaches. In that situation, Congress literally "command[s] state legislatures to legislate" into existence a regulatory regime, *New York*, 505 U.S. at 179, and also encourages federal and state officials "to avoid being held accountable to the voters" for their decisions, *id.* at 182. See also *United States* v. *Lopez*, 115 S. Ct. 1624, 1642 (1995) (Kennedy, J., concurring) (principles of federalism are violated by "a formal command from the National Government directing the State to enact a certain policy").

No such constitutional difficulty is presented, however, when Congress itself devises a clear legislative solution that regulates private conduct, and calls upon local officials for limited, non-policymaking help in enforcing that law. In that situation, Congress does not force the States to make policy, and does not impair the constitutional value of federalism in preserving the accountability of public officials to the people. Put differently, the constitutional line is crossed only when Congress compels the States to make law in their sovereign capacities—but not when Congress requires the assistance of state or local officials in carrying out a broadly applicable federal law.[7]

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[7] To employ an analogy, Congress, acting within its enumerated powers, may preempt state law and require state courts to apply federal law exclusively as a rule of decision to a controversy. But it would be doubtful that Congress could require state legislatures to change their own state law, at federal command, and then compel state courts to apply that new state law. Thus, for example, Congress

Cf. *FERC*, 456 U.S. at 785 (O'Connor, J., concurring in part and dissenting in part) (describing the crucial interest protected by state sovereignty as "the power to choose subjects for legislation[,] * * * a fundamental attribute of legislative power").

b. The distinction discussed above is illustrated by the opposite results reached, on the one hand, in *Testa* v. *Katt*, 330 U.S. 386 (1947), and *FERC* v. *Mississippi*, 456 U.S. 742 (1982), and, on the other hand, in *New York* v. *United States*, 505 U.S. 144 (1992). In *Testa*, the Court held that state courts must follow a federal statutory requirement that they hear federal claims arising under federal law.[8] As the Court explained in *New York*, an important aspect of the requirement at issue in *Testa* was that it "involve[d] congressional regulation of individuals, not congressional requirements that States regulate." *New York*, 505 U.S. at 178. The Court also noted, however, that "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them." *Ibid.*; see also *FERC*, 456 U.S. at 762 (noting that *Testa* "reveals that the Federal Government has some power to enlist a branch of state

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might, without giving rise to any constitutional difficulty, enact a federal products liability law that preempted state law, and might thereby require state courts to apply the federal law to the exclusion of state law. A constitutional problem would be encountered only if Congress directed the state legislatures (or state courts) to change their own *state* products liability law, and apply it *as such*. Only the latter situation encroaches on the States' sovereign capacity to make their own law, and only the latter diminishes state officials' accountability to the people, by promoting the appearance that the States, not the national government, were responsible for the change in the law.

[8] *Testa* did not itself involve a Tenth Amendment challenge, but its relevance to the jurisprudence of federalism is made clear by the decisions in *New York* (505 U.S. at 178) and *FERC* (456 U.S. at 760-762).

government—there the judiciary—to further federal ends").

Similarly, in *FERC*, the Court—in a ruling joined by all nine Justices—sustained a federal statutory requirement, imposed by Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), that state utility commissions "implement" FERC rules designed to encourage power production at small plants. 456 U.S. at 759. That statutory mandate in practice required state executive branch officials to apply federal law to disputes involving private parties. *Id.* at 759-760; *id.* at 775-776 & n.1 (O'Connor, J., concurring in part and dissenting in part).[9]

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[9] Petitioners minimize the relevance of *FERC* and *Testa* as limited to the functions of state judges, but that argument is based on a misunderstanding of the Supremacy Clause. It is not only judges, but all state officials, who must adhere to federal law. See U.S. Const. Art. VI ("all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution"); *Ex parte Siebold*, 100 U.S. 371, 392 (1880) ("The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity."); see also *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993) (noting that state non-judicial official who followed dictates of federal law in drafting apportionment plan "demonstrate[d] obedience to the Supremacy Clause"); Caminker, 95 Colum. L. Rev. at 1093 (explaining that "[t]he Supremacy Clause makes all federal laws the supreme law of the land for all individuals and institutions of state government").

Thus, the *FERC* Court upheld the requirement in PURPA that state *executive* officials enforce federal law. While the Court also noted that the administrative officials served as part of the State's "adjudicatory machinery" (456 U.S. at 761), its holding did not rest on that characterization. Although the state officials required to perform the challenged functions in *FERC* could execute them through a quasi-adjudicatory mechanism of dispute resolution (*id.* at 760), the Court did not hold that PURPA was constitutional as applied to them because they were "judicial Officers" within the meaning of Article VI.

In contrast to the unanimous rejection of the challenge to Section 210 of PURPA, the Court in *FERC* divided sharply with respect to the validity of other challenged provisions, which required that the States "consider" adopting certain energy standards as a matter of state law. *FERC*, 456 U.S. at 761-766. The Court recognized that those requirements—unlike Section 210—implicated significant interests of state sovereignty, *id.* at 761, but it emphasized that PURPA required only that the States "*consider* the suggested federal standards," *id.* at 765. The Court found nothing in PURPA " 'directly compelling' the States to enact a legislative program." *Ibid.*[10]

The provision invalidated in *New York* presented States with two alternatives, as pertinent here: a State could either legislate a regulatory scheme to provide for the disposal of all low-level radioactive waste generated within the State by 1996, or it could take title to the waste at that time. See 505 U.S. at 153-154. The first alternative, the Court emphasized, was a "command [to] state government to enact *state* regulation." *Id.* at 178 (emphasis in original). That directive therefore clashed with the constitutional rule that Congress may not "conscript" the States to legislate a regulatory regime. *Ibid.* The second alternative, the Court found, was fatally flawed for the same

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[10] In rejecting the challenge to PURPA's mandate that state utility commissioners consider federal energy standards, the Court also stated that, theoretically, the States could avoid the federal requirements by ceasing to regulate in the utilities field altogether. 456 U.S. at 764. But, contrary to the suggestion of petitioner Mack (Br. 18 n.8), that reasoning played no part in the Court's analysis of the separate requirement that state administrative agencies "implement" FERC rules by enforcing them against private parties. See 456 U.S. at 759-761. The Court also observed that it was highly "unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA's requirements." *Id.* at 767.

reason, because it effectively required each State to devise a *state* solution to a federally identified problem. See *id.* at 176. Accordingly, the Court held that both statutory alternatives were unconstitutional because both "commandeer[ed]" the States' political processes "by directly compelling them to *enact and enforce* a federal regulatory program." 505 U.S. at 176 (emphasis added). As Justice Kennedy later explained, the portions of the statute that were invalidated in *New York* were held unconstitutional because Congress had required the States "to enact a certain policy." *Lopez*, 115 S. Ct. at 1642 (concurring opinion).[11]

In *New York*, the Court stressed that, when Congress declines to enact a federal legislative solution and instead commands that States "enact and enforce" their own regulatory schemes to address a federal problem, Congress allows officials to avoid responsibility for controversial policy decisions: "Accountability is * * * diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." 505 U.S. at 169. And since the "power to make decisions and to set policy is what gives the State its sovereign nature" (*FERC*, 456 U.S. at 761), federal statutes mandating that state executive officials *make policy* at federal command

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[11] The decision in *New York* also upheld significant portions of the statute under challenge. The Court held that Congress could, pursuant to its power under the Spending Clause, require the States to achieve certain milestones in the regulation of radioactive waste as a condition to receipt of funds collected from federal taxes and placed in an escrow account. 505 U.S. at 171-173. The Court also held that Congress could, pursuant to its commerce power, authorize States to restrict and deny access to radioactive waste generated in other States that did not meet federal deadlines for addressing the disposal of such waste. *Id.* at 173-174.

also implicate the accountability concerns central to constitutional principles of federalism. See *ibid.* ("the ability of a state legislative (or, as here, administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system").

Those problems do not exist here. In the GCA and the Brady Act, Congress itself has identified national problems (gun violence and ineffective restrictions on handgun sales) and has devised clear legislative solutions to those problems—specific categories of persons to whom handguns may not be transferred, limited record checks before handgun transfers take place, and waiting periods to permit those checks to occur. Congress has not required the States to make any substantive policy decisions about who should or should not be eligible to own handguns, nor has it instructed the States to devise solutions to the problem of gun violence. Rather, it has merely called on local officials to assist in the implementation of the federal regulation governing gun transfers, on the reasoning that those officials have the best access to the most relevant records, such as state felony convictions. Accordingly, the Brady Act does not contravene constitutional principles of federalism, for this case is controlled by *Testa* and *FERC*, rather than *New York*.

c. The Court in *New York* stated that the "Federal Government may not compel the States to enact or *administer* a federal regulatory program." 505 U.S. at 188 (emphasis added). Petitioners divorce that particular sentence from its context, and interpret it as establishing an absolute bar to any federal requirement that state and local officials assist in the implementation of national policy. See Printz Br. 15; Mack Br. 28. As the preceding discussion demonstrates, however, that sentence must be under-

stood in relation to the Court's expressed concern in *New York* that Congress had diminished the political accountability of public officials to the people (and had thereby encroached on liberty) by commandeering the machinery of state policymaking in *both* the legislative and administrative spheres. That concern for political accountability in administrative *policymaking* was fundamental to the decision in *New York*. If a State declined to legislate a radioactive waste regulatory regime and was therefore required by the federal statute to take title to such waste, it would have had to resolve administratively the same policy issues that would have confronted the state legislature. In effect, the State's administrators would have been compelled to create a state-law mechanism to address the national problem foisted on the States by Congress. See 505 U.S. at 175-176.

The Brady Act provisions at issue here stand in marked contrast to those struck down in *New York*. The law invalidated in *New York* was a "command [to] state government to enact *state* regulation" (either by legislation or administrative initiative) to deal with the problems of radioactive waste. *New York*, 505 U.S. at 178 (emphasis in original). In distinction, the Brady Act represents a clearly articulated congressional solution to the problems posed by handgun violence, especially insufficiently effective regulation of handgun transfers between private parties. The Brady Act does not require CLEOs to make policy; rather, like the statute upheld in *FERC*, the Act only requires state officials to assist in the application of federal law to private parties in the course of their ordinary duties. The Brady Act is therefore not an impermissible command to the States to promulgate laws or regulations, but an unobjectionable requirement that officials assist in "congressional regulation of individuals." *New York*, 505 U.S. at 178.

The critical distinction drawn in *New York* is, therefore, between Acts of Congress that require States "to enact a certain policy," see *Lopez*, 115 S. Ct. at 1642 (Kennedy, J., concurring), and those that do not. Petitioners, however, reject that distinction, based on this Court's observation in *New York* that the statute then before it did not involve Congress's "subject[ing] a State to the same legislation applicable to private parties." 505 U.S. at 160. From that sentence, they infer that *any* federal statutory obligation falling particularly on state or local officials is unconstitutional. That argument, however, misapprehends the Court's concerns in *New York*, and it does not explain *why* constitutional principles of federalism are not implicated when the States are subjected to generally applicable federal legislation.

What is significant for constitutional purposes about a statute of general application is that such an enactment, by its nature, *cannot* constitute a directive to the States to formulate state policy in response to a federal command. Rather, by such a provision, the States (along with private parties) are required to adhere to a clearly articulated federal policy. The central question addressed in *New York* need not be considered with respect to statutes of general applicability, for it does not arise.

When, however, Congress enacts a statutory obligation falling particularly on individuals who are state or local officials, it is necessary to examine the statute to determine whether Congress has impermissibly "require[d] the States to regulate," *New York*, 505 U.S. at 178, or whether it has merely enlisted the assistance of state or local officials in implementing federal law with regard to private conduct. The fact that the challenged provisions of the Brady Act are not generally applicable only *raises* the further question whether Congress has impermissibly intruded on state sovereignty by requiring the States to

make policy. In this case, the answer to that question is that Congress has not done so. See pp. 21-23, *supra*.

2. The Framing And Ratification Of The Constitution, As Well As Subsequent History, Demonstrate That Congress May Require State Officials To Assist In The Implementation Of Federal Law

a. The validity of the limited requirement of assistance by state and local officials in the implementation of federal law, as in the Brady Act, is underscored by the understanding of the Framers, actions of the early Congresses, and other historical evidence. Both proponents and opponents of the Constitution understood that, under our system of federalism, the national government could lawfully call upon state officials to provide assistance in implementing national policy governing private parties. To be sure, the Framers did not want the national government to be dependent on state legislation for the implementation of its laws (as had been the case under the Articles of Confederation and under the New Jersey Plan proposed at the Convention), and so they empowered Congress to legislate directly for the people of the Nation. See *New York*, 505 U.S. at 163-164. The Framers rejected the New Jersey Plan because they thought it would be ineffective in ensuring the faithful execution of national law, and also because it carried the potential for serious friction between the national government and the States; Alexander Hamilton ventured that, if the national government had no power to implement its laws directly, it might eventually be required to resort to armed force against the States in order to enforce its will. See *id.* at 165-166; *The Federalist* No. 15, at 95-96, No. 16, at 99-101 (J. Cooke ed. 1961).

The Framers therefore rejected a plan that would have required the national government to coerce the States to act *in their sovereign capacity* in order to implement the

law. See *The Federalist* No. 15, at 95-96 (Hamilton) (discussing flaws of confederacies requiring coercion against "bodies politic, or communities or States"). The Court's decision in *New York* reflects that specific concern, for the State of New York there was coerced by the federal government to exercise its sovereign power of legislation in order to implement federal will. This case, however, does not involve coercion of sovereign States, but the obligation of local officials to perform a modest duty in aid of the enforcement of federal law.[12] And in the Plan of the Convention—including the Constitution's Supremacy Clause—the national government was not prohibited from requiring local officials to assist in implementing federal law. Cf. *Ex parte Siebold*, 100 U.S. 371, 392 (1880) ("The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity.") In fact, the Framers thought that the execution of federal requirements by state and local officials could serve federalism well, for it would avoid the danger of a remote and unresponsive federal bureaucracy. See *The Federalist* No. 45, at 312-313 (Madison).

The issue was discussed to a considerable extent during the ratification of the Constitution, when opponents of the Constitution argued against empowering Congress to levy direct taxes. The Anti-Federalists stressed that a dual system of direct taxation, based on both state and fed-

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[12] Compare *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1124-1125 (1996) (emphasizing limits on Congress's power to abrogate States' sovereign immunity, and the "indignity of subjecting a State to the coercive process of judicial tribunals") with *Ex parte Young*, 209 U.S. 123, 155-156 (1908) (holding that "individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State * * * may be enjoined by a Federal court of equity from such action").

eral authority, would have the pernicious effect of subjecting citizens to two sets of intrusive revenue officers.[13] Supporters of the Constitution responded that Congress

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[13] Patrick Henry anticipated that sheriffs would be required to assist in federal tax collection: "The sheriff comes to-day as a state collector. Next day he is federal." 3 *The Debates In The Several State Conventions On The Adoption Of The Federal Constitution* 168 (J. Elliot ed. 1987). See also 1 *The Debate on the Constitution* 217 (Bernard Bailyn ed. 1993) (hereafter Bailyn) ("Cato," arguing that "the necessity to enforce the execution of revenue laws (a fruitful source of oppression)" would ultimately require a federal standing army); 1 Bailyn 502 ("Brutus," arguing that direct federal taxation "opens a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community"); *id.* at 506 ("Brutus," noting that direct taxes "will introduce such an infinite number of laws and ordinances, fines and penalties, courts, and judges, collectors, and excisemen, that when a man can number them, he may enumerate the stars of Heaven"); 1 Bailyn 613-616 ("Brutus," discussing generally dangers of double systems of taxation); 1 Bailyn 697 ("Brutus," arguing that national government should only have authority to raise revenue "of such a nature, that the tax should be raised * * * with few officers"); 1 Bailyn 939 (Nathaniel Barrell, at Massachusetts Convention, stating that "a continental collector will not be so likely to do us justice in collecting the taxes, as collectors of our own"); 2 Bailyn 119 ("Letter from John Williams to His Constituents," stating that "direct taxation, and to be collected by officers of Congress, are powers which cannot be granted agreeable to our present constitution, nor will it be very convenient for Congress officers, and our state collectors, to be collecting both at one time"); 2 Bailyn 633 (Patrick Henry, at Virginia Convention, warning that "the salaries and fees of the swarm of officers and dependents on the Government will cost this Continent immense sums," and specifically that "[d]ouble sets of collectors will double the expence"); *id.* at 635 (Patrick Henry, opposing Federalists' solution that "one collector may collect the Federal and State taxes," because, "if the Sheriff is to collect for both, * * * his collections will go to Congress"); 2 Bailyn 817 (Melancton Smith, at New York Convention, warning that there would be "two lists of all kinds of officers—supervisors, assessors, constables," and that the two sets of taxing officers "will be hostile to each other").

would likely "make use of the State officers and State regulations, for collecting" federal taxes, thus rendering "double sets of officers" unnecessary, and the threat from them illusory. See *The Federalist* No. 36 at 227 (Hamilton); see also *id.* at 226 (in assessing and collecting taxes, "[t]he national Legislature can make use of the *system of each State within that State*"). James Madison argued in particular that, although the federal government would theoretically have the power under the Constitution to collect taxes itself, "it is probable that this power will not be resorted to," and "the eventual collection under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States"). *The Federalist* No. 45, at 312-313.[14] More generally, the Federalists argued that the Constitution would "enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws," *The Federalist* No. 27, at 174 (Hamilton),[15] and

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[14] See also 2 Bailyn 655 (Madison, at Virginia Convention, noting that Congress "may even refer to the State systems of taxation").

[15] In using the term "magistracy," Hamilton plainly included executive officials. See *The Federalist* No. 27, at 175 (Hamilton) (noting that, by virtue of the Supremacy Clause, "the Legislatures, Courts and Magistrates of the respective [States] will be incorporated into the operations of the national government, as far as its just and constitutional authority extends, and will be rendered auxiliary to the enforcement of its laws") (emphasis omitted); see also *The Federalist* No. 44 (Madison) (referring generally to "State magistracy"); *The Federalist* No. 47, at 325-331 (Madison) (discussing role of "executive magistrate"); 2 Bailyn 618 (Madison replying to Patrick Henry, in Virginia Convention, referring to States' election of their "first Magistrate"). See generally *Black's Law Dictionary* 951 (6th ed. 1990) ("In its widest sense [magistracy] includes the whole body of public functionaries[.] * * * In a more restricted (and more usual) meaning, it denotes the class of officers who are charged with the application and execution of the laws.").

that it was "extremely probable that in other instances, particularly in the organisation of the judicial power, the officers of the States will be cloathed with the correspondent authority of the Union." *The Federalist* No. 45, at 313 (Madison). See also Samuel H. Beer, *To Make A Nation: The Rediscovery of American Federalism* 252 (1993) ("Madison himself expected the new federal government to govern through the state governments"); Caminker, 95 Colum. L. Rev. at 1043.

b. Consistent with the understanding of the Framers, the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws.[16] The First Congress required the clerk of "any common law court of record, in any one of the states," to record the application of a person seeking citizenship under federal naturalization laws. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103. Congress enacted no provision at that time directing the clerks of federal courts to record such naturalization applications. In 1798, the Fifth Congress required clerks of courts—including state courts[17]—who had received declarations of intent by aliens seeking to

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[16] Legislation enacted by the early Congresses provides an important guide to understanding the Framers' constitutional plan. *E.g.*, *Myers* v. *United States*, 272 U.S. 52, 175 (1926); *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 57 (1884); see also *Mistretta* v. *United States*, 488 U.S. 361, 398-401 (1989); *Marsh* v. *Chambers*, 463 U.S. 783, 786-792 (1983).

[17] Naturalization acts subsequent to 1790 made clear that the clerks receiving such declarations included state court clerks. See Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414 (1795) (requiring alien to declare "on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states"). A subsequent law passed by the Seventh Congress also reflects that understanding. See Act of Apr. 14, 1802, ch. 28, § 1, 2 Stat. 153 (1802) (alien "shall have declared, on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states").

become citizens, "to certify and transmit * * * an abstract of such declaration" to the United States Secretary of State; the law also provided that clerks would be penalized $10 for failing to comply. Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567. In 1802, the Seventh Congress directed court clerks to participate in the creation of a national registry of aliens, and required the clerks to issue certificates to aliens seeking naturalization. Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-155. These early enactments were related to other early Acts of Congress, such as that passed by the First Congress, providing that aliens seeking naturalization could be admitted to citizenship by any state common law court of record. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103.[18]

Nor are such Acts of Congress limited to the Framers' era; Congress has, from time to time, found it necessary and proper to impose obligations on state officials to assist in the execution of federal policy. In the 1880s, when the federal government faced problems arising from mass unrestricted immigration, but lacked the administrative machinery to screen immigrants for the suitability of their entry into the United States, Congress established an interim scheme under which state officials examined immigrants arriving at ports to determine whether they should be excluded on the basis of a criminal conviction, a mental impairment, or poverty. See Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214. State officials were also required to send convicts back to their country of origin, and Congress expressly stated that that task should be undertaken under the direction of the Secretary of the Treasury, and without compensation. § 4, 22 Stat. 214. Once the federal government developed its own enforcement

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[18] Federal courts were not authorized to naturalize aliens until 1795. Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414.

apparatus to screen immigrants, Congress relieved state officials of that obligation. See Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

Perhaps the salient example of the federal government's enlistment of state officials to assist in implementation of federal law is the mass registration of young adult men for the draft on June 5, 1917. When Congress enacted a selective draft law on May 18, 1917, there was no federal administrative machinery in place to provide for the registration of those eligible for the draft. Accordingly, Congress authorized the President "to utilize the service * * * of the several States * * * in the execution of this Act," and also provided that any state official designated by the President to perform a function who refused to do so would be guilty of a misdemeanor. Act of May 18, 1917, ch. 15, § 6, 40 Stat. (Part 1) 80-81. President Wilson issued a proclamation and regulations directing that state and local officials conduct a one-time mass registration.[19] The actual registration was carried out by local officials, principally county clerks and sheriffs. After the registration was completed, the local officials turned over the registration cards to federally appointed local draft boards, which were still being created while the registration was taking place.[20]

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[19] See Proclamation of May 18, 1917, 40 Stat. (Part 2) 20; Registration Regulations Prescribed by the President Under Authority of the Act of Congress Approved May 18, 1917 (Regulations). See especially Regulations ¶ 9: "As far as possible, the execution of the law in each State will be accomplished by State, county, and municipal officers and agencies." Because those Regulations were not printed in the regular serial set of government documents, we have lodged a copy with the Clerk of this Court and provided petitioners with a copy.

[20] See generally John Whiteclay Chambers II, *To Raise An Army: The Draft Comes to Modern America* 181-182 (1987); *Report of the*

Today as well, several federal statutes require participation by state and local officials in implementing federal regulatory schemes.[21] Under petitioners' theory, however, those Acts of Congress would all be unconstitutional. But as the examples we have given demonstrate, there simply is no flat rule prohibiting Congress from enlisting assistance from state officials in carrying out a federal program. In particular (as the immigration and draft registration examples noted above demonstrate), Congress may call on local assistance to implement a law during an interim period, while the federal government is devising its own permanent administrative machinery. The Brady Act falls securely into that paradigm.[22]

Provost Marshal General to the Secretary of War on the First Draft Under the Selective Service Act, 1917, at 7 (1918).

[21] *E.g.*, 42 U.S.C. 5779(a) (requires state and local law enforcement agencies to report cases of missing children); 23 U.S.C. 402(a) (requires state officials to implement highway safety programs and to report traffic fatalities); 42 U.S.C. 11001, 11003 (requires comprehensive data collection and reporting, as well as the creation of state emergency response commissions, with respect to the release of hazardous substances); 15 U.S.C. 2645 (requires governors to conduct certain reporting and approval activities with respect to local educational agencies); 20 U.S.C. 4013 (requires governors to submit plans for asbestos abatement and follow certain reporting procedures); 42 U.S.C. 6933 (requires inventories of state hazardous waste sites); 42 U.S.C. 6991a (requires governors to inventory underground storage tanks).

[22] Of course, it is possible to imagine hypothetical situations in which Congress might impose intolerable burdens on state and local governments in the execution of federal law. But as Justice Frankfurter noted of a similar issue in *New York* v. *United States*, 326 U.S. 572, 583 (1946), "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency." And as Alexander Hamilton observed 150 years earlier about the Anti-Federalists' speculations of federal destruction of state autonomy, "[t]he moment we launch into

B. The Brady Act Imposes No Substantial Burden On The Functions Of Chief Law Enforcement Officers

Petitioners suggest that the Brady Act is unconstitutional because it imposes a burden, in terms of finances, effort, and time, on the functioning of their offices. This Court has made clear, however, that no constitutional problem exists simply because state officials must devote "substantial effort[s]" to implementing a federal requirement. See *South Carolina* v. *Baker*, 485 U.S. at 514-515. And the Court has established that federal mandates that cause States and local governments to spend money are not unconstitutional for that reason alone. See *FERC*, 456 U.S. at 770 n.33 (State's argument based on financial burdens was "unconvinc[ing]").

A constitutional problem might arise if the burden imposed by the federal legislation were so severe as to threaten the States' "separate and independent existence." *EEOC* v. *Wyoming*, 460 U.S. 226, 239 (1983); see *Garcia*, 469 U.S. at 556 (reserving question whether "the constitutional structure" might impose "affirmative limits" on

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conjectures about the usurpations of the foederal Government, we get into an unfathomable abyss, and fairly put ourselves out of the reach of all reasoning. Imagination may range at pleasure till it gets bewildered amidst the labyrinths of an enchanted castle, and knows not on which side to turn to extricate itself from the perplexities into which it has so rashly adventured." *The Federalist* No. 31, at 197. In fact, while Congress has the authority, in the exercise of its enumerated powers, to require the assistance of state and local officials in carrying out federal law, it has not exercised that authority routinely—which suggests that the fundamentally political safeguards in the Plan of the Convention that "preserv[e] the States' interests" have operated with success, and will continue to protect the States from undue intrusions by Congress. Cf. *Garcia*, 469 U.S. at 552-554; *id.* at 556 ("The political process ensures that laws that unduly burden the States will not be promulgated.").

federal action affecting the States). Such threats, however, are little more than academic hypotheticals, for "the built-in restraints that our system provides through state participation in federal governmental action * * * ensures that laws that unduly burden the States will not be promulgated." *Ibid.* Furthermore, it is unnecessary here to identify the precise boundaries of any "affirmative limits" that the constitutional structure might impose on federal action, for whatever those outer limits might be, they are not tested by the modest obligations that the Brady Act imposes on CLEOs.

A close examination of the Brady Act demonstrates that it does not have any substantial effect on the workings of state and local government. The Act imposes only temporary and minimal duties on local officeholders and grants them great discretion in determining how to meet those responsibilities. Moreover, the Act requires the assistance of CLEOs in implementing federal handgun control policy only because of the considered judgment of Congress that, in the short run, CLEOs are uniquely positioned to assist in the prevention of the illegal transfer of handguns. Further, Congress has provided significant financial assistance to the States in connection with criminal history records. In short, the Brady Act could be found unconstitutional only if this Court were to resurrect the long-repudiated view that "Congress 'has no power to impose on a State officer, as such, any duty whatever.'" *FERC*, 456 U.S. at 761 (quoting *Kentucky* v. *Dennison*, 24 How. (65 U.S.) 66, 107 (1861)); see *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658, 676-678 (1978) (noting that the constitutional theory of *Dennison* and similar decisions "has not survived").

1. a. The CLEOs' primary responsibility under the Brady Act is to make a "reasonable effort" to ascertain, by consulting "available" records, whether a legal impedi-

ment exists to a proposed handgun sale. 18 U.S.C. 922(s)(2). By 1999, however, the federal government must establish a national instant background check system, and CLEOs' obligations under the Act will terminate when such a system is in place. See 18 U.S.C. 922(s)(1) and 922 note. Firearms dealers will then be required to use the federal system to determine whether any legal impediment exists to the sale. 18 U.S.C. 922(t)(1). The temporary nature of the requirement, enacted in response to a national crisis of handgun violence, diminishes constitutional concerns. See pp. 30-31, *supra* (discussing use of state and local officials in draft registration during World War I); *Fry* v. *United States*, 421 U.S. 542, 548 (1975) (emphasizing, in sustaining the application of wage and salary freezes to state employees, that statute was an emergency measure); *National League of Cities* v. *Ursery*, 426 U.S. 833, 853 (1976) (stressing that *Fry* involved a statute of temporary applicability); cf. *Wayte* v. *United States*, 470 U.S. 598, 613 (1985) (noting, in rejecting a First Amendment challenge, that the challenged scheme was the "only effective interim solution" to a significant national problem).

Congress's decision to require assistance of CLEOs in the interim period was based on the judgment that CLEOs' access to relevant records and their personal knowledge of their communities would make them "best able to determine if the individual is disqualified to own a gun." H.R. Rep. No. 691, 101st Cong., 2d Sess. 11 (1990); see also *id.* at 10 (knowledge of CLEOs is a "[c]entral" benefit of the Act).[23] That decision to involve CLEOs in record checks

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[23] Accord *Brady Handgun Violence Prevention Act: Hearings on H.R. 1025 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 90 (1993) (*Hearings on H.R. 1025*) (statement of Rep. Schumer); *id.* at 89 (testi-

reflected the recommendation of state and local law enforcement officials. As the Superintendent of the New Jersey State Police testified before Congress, a CLEO is best situated to perform a record check because he "knows the people in his community. He knows where the complaints come from."[24]

Assistance by the CLEOs in enforcing the Brady Act also accords with our country's longstanding tradition—grounded largely in principles of federalism—against a national police force. See *Garcia* v. *United States*, 469 U.S. 70, 89 (1984) (Stevens, J., dissenting). Unless Congress relied on CLEOs for assistance (or decided to take no action to address the pressing problem of gun violence), it would have had to require federal law enforcement officers to perform background checks. Such a system would have diminished the historic role of local government in law enforcement, a result directly contrary to the principles of federalism on which petitioners rely.

At the same time, Congress carefully crafted the statute to limit its burden on CLEOs' available resources. Congress thus required only that a CLEO make a "reasonable effort" to determine the legality of a proposed handgun transfer. 18 U.S.C. 922(s)(2). As the court of appeals observed, the Brady Act's "reasonable effort" requirement represents "a minimal interference with state functions." Pet. App. 14a. That was also Congress's understanding when it established the interim requirements.

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mony of Ass't Attorney General Acheson); *Brady Handgun Violence Prevention Act: Hearings on H.R. 7 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 15 (1991) (statement of Rep. Sangmeister).

[24] *Waiting Period Before the Sale, Delivery, or Transfer of a Handgun: Hearings on H.R. 975 and H.R. 155 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 100th Cong., 1st, 2d Sess. 243 (1987 and 1988) (*Hearings on H.R. 975 and H.R. 155*).

See House Report, *supra*, at 23 (reprinting Congressional Budget Office statement that Brady Act's financial "impact on any given jurisdiction is likely to be small").

b. Petitioners contend that the Brady Act places a substantial burden on them, but they disregard the crucial language of the Act requiring only a "reasonable effort." Congress did not require CLEOs to insure the legality of every, or indeed any, handgun transfer. Rather, Congress asked CLEOs to do only what is "reasonable" in their own circumstances, and in their own judgment. Put differently, the Brady Act's "reasonable effort" provision, by its terms, cannot place an "unreasonable" burden on any CLEO. The statutory language requiring only a "reasonable effort" was adopted precisely to avoid onerous burdens on CLEOs. See 139 Cong. Rec. S2001 (daily ed. Feb. 24, 1993) (statement of Sen. Kohl) (CLEOs will "use available resources"); 139 Cong. Rec. H9118 (daily ed. Nov. 10, 1993) (statement of Rep. Nadler) (checks will occur "within the constraints of existing information systems").[35]

Petitioners also fail to come to terms with ATF's definitive interpretative guidance on the meaning of the "reasonable effort" provision. ATF has stressed that the CLEOs themselves are "in the best position" to determine

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[35] As one law enforcement leader explained, the Act gives "[t]he law enforcement executive * * * discretion to determine what procedure best suits his or her agency." *Hearings on H.R. 1025*, *supra*, at 254 (testimony of Exec. Director of Police Executive Research Forum). Even before passage of the Brady Act, local law enforcement officials undertook similar record checks for a variety of purposes. A local official testified before Congress that, prior to the Brady Act, he would "run probably two or three checks a day in some cases on people who have been stopped for various things." *Hearings on H.R. 975 and H.R. 155*, *supra*, at 124 (testimony of Vice Pres. of Ohio Union of Patrolmen's Ass'n).

what measures are "reasonable" in any given instance. U.S. Resp. App. 15a. ATF has further noted that "[e]ach * * * CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." *Id.* at 14a-15a.

In addition, ATF explained that the statute requires no more than "some *minimal effort* to check commonly available records" and does not necessitate research into "every conceivable record system that may contain information relating to categories of prohibited persons." U.S. Resp. App. 13a-14a (emphasis added). Moreover, as ATF has made clear, because the "vast majority of persons who are prohibited from possessing a handgun are prohibited by virtue of some criminal background," a CLEO's reasonable effort may usually be limited to readily available criminal history records. *Id.* at 14a; see also 18 U.S.C. 922 note (permanent Brady system to be based on criminal history records). Indeed, in some circumstances, a CLEO may properly determine that it is reasonable not to engage in any research at all, as when purchasers are known personally to local officials, or when an emergency counsels against diversion of resources away from other law enforcement priorities of the jurisdiction to Brady Act background checks. See U.S. Br. App. 14a-15a.[35]

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[35] Petitioners' testimony in the district courts in these cases is difficult to reconcile with the account they now propose of the Brady Act's impact on their offices. Petitioner Mack testified that he generally relied on a computer check to meet his Brady Act responsibilities; his office performed an average of one check per day, conducted by a dispatcher in his office and then reviewed by the sheriff or his undersheriff. 5/31/94 Tr. 6-7. Petitioner Printz offered no testimony about the burdens actually imposed on his office by the Act. He identified a series of records that might be relevant to an extensive background check of a person seeking to purchase a handgun, 95-1478

In sum, as the court of appeals concluded, petitioners "have not been subjected to any interpretation of the Act, or any attempt to enforce it against them, that requires them to do more than check computer records." Pet. App. 16a. Because that "minimal effort" (U.S. Br. App. 13a) presents no substantial threat to the independent functioning of local government, the record-check requirement passes constitutional muster.[27]

J.A. 10a-13a, and stated that "whether a failure to examine them would be 'reasonable' or 'unreasonable' within the meaning of the law I cannot guess." *Id.* at 10a. He also stated that, depending on the search required under the law, a check of the records "might require anywhere from a man-hour to several man-days," and declared that "[i]f I am now compelled to perform background checks of our residents, it will have to be done by pulling deputies off patrol and investigation duties." *Id.* at 14a. Those speculations, however, fail to take into account ATF's definitive construction of the "reasonable effort" requirement to refer to a "minimal effort" to check computer records and readily available criminal-history records. Moreover, petitioner Printz testified that his office frequently checked computerized criminal-history records even before enactment of the Brady Act. *Id.* at 33a-34a.

[27] Cf. *South Carolina* v. *Baker*, 485 U.S. at 529 (Rehnquist, C.J., concurring in the judgment) (concluding that requirements at issue had no "substantive effect" on significant state functions). In analogous areas of separation of powers, the Court has emphasized that minimal intrusions do not raise issues of constitutional magnitude. See *Morrison* v. *Olson*, 487 U.S. 654, 691 (1988) (upholding limitation on President's power to remove special prosecutor because it does not "unduly trammel[] on executive authority"); *Helvering* v. *Gerhardt*, 304 U.S. 405, 421 (1938) (to establish tax immunity, State would have to show that "the burden upon the state function is actual and substantial, not conjectural"); *Department of Taxation & Finance* v. *Milhelm Attea & Bros.*, 114 S. Ct. 2028, 2035-2036 (1994) (reconciliation of state and tribal powers is not governed by a "rigid rule" based on "mechanical or absolute conceptions of state or tribal sovereignty," and the general rule that a State may not regulate Indian traders is not contravened by a state law imposing "minimal burdens" on reservation retailers).

2. The two additional obligations of CLEOs under the Brady Act are even less onerous. The requirement that a CLEO destroy the records pertaining to a record check if that check does not reveal that the transferee is prohibited from possessing firearms (18 U.S.C. 922(s)(6)(B)(i)) is clearly *de minimis* and therefore without constitutional significance. Sheriff Mack explained that he fulfills that obligation by reminding his secretary "from time to time" to destroy the documents. 5/31/94 Tr. 9.

Similarly, the requirement that a CLEO, on request, inform the transferee of the reason that he has found a legal impediment to a proposed handgun transfer (18 U.S.C. 922(s)(6)(C)) is not burdensome. That provision requires only that the CLEO note the legal bar to the sale by stating, for example, that records indicate that a prospective purchaser is a convicted felon. That obligation could be met by checking a box on a form. Neither petitioner testified in the district court proceedings about any burden in connection with that requirement.

3. Finally, in enacting the Brady Act, "Congress has not simply placed a financial burden on the shoulders of States and localities * * * but has provided substantial countervailing financial assistance as well," see *Garcia*, 469 U.S. at 555, a factor that further diminishes constitutional concerns. See *FERC*, 456 U.S. at 751-752 n.14, 770 n.33. Congress has made a "huge" financial commitment to assisting the States with implementation of the Brady Act. *Hearings on H.R. 1025*, note 23, *supra*, at 104 (testimony of Ass't Att'y Gen. Acheson). Specifically, the Brady Act authorizes $200 million in funds for grants to States for the "creation of a computerized criminal history record system or improvement of an existing system," improvement of their "access[] to the national instant criminal background system," and (once the national system is in place), "assist[ance to] the State[s] in the

transmittal of criminal records" to that system. 18 U.S.C. 922 note. Congress has already appropriated $100 million of those funds for disbursement to the States. Violent Crime Control Appropriations Act, 1995, Pub. L. No. 103-317, Tit. VIII, 108 Stat. 1777 (1994). The interim statutory requirements are thus emphatically "not an unfunded mandate." 139 Cong. Rec. S16,304 (daily ed. Nov. 19, 1993) (statement of Sen. Mitchell).[28]

C. Petitioners' Commerce Clause Argument Adds Nothing To Their Tenth Amendment Argument.

Petitioners argue that, in addition to violating the Tenth Amendment, the Brady Act exceeds Congress's authority under the Commerce Clause. See Printz Br. 26-28; Mack Br. 35-40. As this Court explained in *New York*, however, when it is argued that the Commerce Clause is violated because Congress has regulated organs of state government, the inquiries under the Commerce Clause and the Tenth Amendment are merely "mirror images of each other." 505 U.S. at 156. "[I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Ibid.* Accordingly, the Commerce Clause adds nothing to petitioners' argument based on the Tenth Amendment.[29]

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[28] That funding augments the significant pre-existing federal commitment in the area of criminal history records. Under the formula grant program established by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, the United States provided nearly $850 million to States in fiscal years 1992 and 1993. See 95-1503 J.A. 12, 16. Five percent of the grant money (over $40 million in 1992 and 1993) must be used for improving state criminal history records. *Id.* at 23-24; 42 U.S.C. 3759(a).

[29] In *FERC*, the State of Mississippi made a similar argument, that PURPA violated the Commerce Clause in addition to the Tenth Amendment, because the Commerce Clause did not empower Congress to direct States to regulate. 456 U.S. at 754-755. The Court concluded

Congress clearly has authority under the Commerce Clause to make laws governing the transfer of firearms in and affecting commerce. *E.g.*, *United States* v. *Haddad*, 558 F.2d 968, 972-974 (9th Cir. 1977). Indeed, petitioners do not even suggest that the transfers of firearms do not "substantially affect[]" interstate commerce. Cf. *Lopez*, 115 S. Ct. at 1630. The Brady Act reinforces preexisting restrictions under the GCA against transfers to disqualified persons of guns in or affecting commerce, see 18 U.S.C. 922(b) and (g), and the Brady Act operates only in conjunction with proposed commercial transfers of handguns by federally licensed firearms importers, manufacturers, and dealers, see 18 U.S.C. 922(s)(1). Thus, unlike the statute invalidated in *Lopez*, the Brady Act is a "regulation of an activity that substantially affects interstate commerce." 115 S. Ct. at 1630. Indeed, the Brady Act is a regulation of commerce itself, or at the least is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut" without the Act. *Id.* at 1631.

Since the regulated activity, the transfer of firearms, is legitimately subject to federal regulation under the commerce power, "the only remaining question for judicial inquiry is whether the means chosen" by Congress are "reasonably adapted to the end permitted by the Constitution." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) (internal quotation marks omitted). "The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme." *Ibid.* Petitioners have offered no basis for a conclusion that the Act is an irrational means of advancing the end of regulating the

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that the Commerce Clause supported Congress's exercise of regulatory authority. *Id.* at 755-758.

sale of firearms to persons not lawfully entitled to receive them.

* * * * *

In sum, the Brady Act is a reasonable congressional response to a national problem that does not impinge on values of federalism or any aspect of power reserved to the States under the Tenth Amendment. The federal government has not compelled the States to enact into law a regulatory regime, nor has it foisted onto the States the obligation to solve a controversial policy issue. The policies of the Brady Act are clearly those of the federal government, and Congress and the President are directly accountable for their highly publicized actions in passing and signing the Brady Act. Indeed, the Brady Act advances values of federalism by temporarily placing the record-check function in the hands of local officials, who are most likely to know the community where the proposed firearm transfer is to occur. The obligations of local officeholders under the Brady Act are reasonable, indeed minimal, and the "reasonable effort" provision of the Brady Act was enacted (by Congress) and interpreted (by ATF) to provide CLEOs with the discretion needed to allocate their resources as they see fit while undertaking the review of readily available records. No interest of federalism would be advanced by invalidating the Act.

II. EVEN IF ANY OF THE CHALLENGED PROVISIONS OF THE BRADY ACT CONTRAVENES THE TENTH AMENDMENT, NO OTHER PROVISION OF THE ACT SHOULD BE INVALIDATED

A. The Validity Of The Five-Day Waiting Period And Notification Requirements Imposed On Firearms Dealers Is Not Properly Before The Court

Petitioners have argued that, if the Brady Act's record-check and destruction-of-records requirements imposed on CLEOs are held unconstitutional, three other provisions of the Act must fall with them: the five-day waiting period imposed on firearms dealers under Section 922(s)(1)(A)(ii)(I); the duty imposed on firearms dealers, under Section 922(s)(1)(A)(i)(III), to notify CLEOs of an impending firearm transfer and provide identifying information about the transferee; and the duty imposed on CLEOs, under Section 922(s)(6)(C), to explain to transferees why the CLEO has found a legal impediment to the transfer. See Mack Br. 40-45; Printz Br. 33-45.

This Court should not reach the question of the continuing validity of the duties imposed only on firearms dealers, namely the five-day waiting period and the requirement that dealers provide notice to CLEOs of impending transfers. Petitioners lack Article III standing to challenge those provisions of the Act, which have no impact on them. The irreducible constitutional minimum of standing requires "that the party seeking review be himself among [those] injured" by the provision under challenge, *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972). "[A] party seeking review must allege facts showing that he is himself adversely affected." *Id.* at 740.

A firearms dealer might conceivably bring a lawsuit contending that the notification and five-day waiting

period requirements are inseverable from invalid portions of the Brady Act, and are therefore no longer valid law. No such party is presently before the Court, however. Accordingly, petitioners have asked this Court to decide what is, at this point, a purely academic question of severability. Petitioners plainly have a sincere interest in that question, but "a mere 'interest in a problem'" is insufficient to confer standing. *Sierra Club*, 405 U.S. at 739; cf. *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1018 (1995) (holding that relief should not be provided to nonparties "when a narrower remedy will fully protect the litigants").

Moreover, neither petitioner presented any question of severability in his petition for a writ of certiorari. See 95-1478 Pet. i; 95-1503 Pet. i. Petitioners presented for review only the question of the constitutionality of particular provisions of the Brady Act directly affecting them. Accordingly, insofar as petitioners are asking this Court to strike down provisions of the Brady Act not affecting them, to which no Tenth Amendment challenge has been made, those contentions are not properly before the Court. See Sup. Ct. R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 535-538 (1992).[30]

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[30] By contrast, the continuing validity of the requirement that CLEOs provide notice to transferees of their reasons for concluding that a proposed transfer would be illegal is properly before the Court. Petitioners presented a Tenth Amendment challenge to that provision. This Court has, under similar circumstances, considered the continuing validity of statutory provisions that were upheld against constitutional challenge but were related to other parts of the statute that were successfully challenged. See *New York* v. *United States*, 505 U.S. at 186-187. Petitioners also have Article III standing to challenge that provision, because it directly affects them.

B. Each Of The Challenged Provisions Is Severable From The Remainder Of the Brady Act

1. As every lower court that has addressed the issue has concluded, the provisions of the Brady Act under challenge here are fully severable from the rest of the Act.[31] Those unanimous rulings are the correct result of the stringent test that this Court has established in its severability decisions for invalidation of an entire statutory scheme on the basis of a holding that individual provisions are unconstitutional. This Court has explained on numerous occasions: "[A] court should refrain from invalidating more of the statute than is necessary. . . . 'Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.'" *Alaska Airlines* v. *Brock*, 480 U.S. 678, 684 (1987); see *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

Accordingly, "[u]nless it is evident that [Congress] would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *New York*, 505 U.S. at 186; see also *United States* v. *Jackson*, 390 U.S. 570, 585 (1968). "[T]he unconstitutional provision *must be severed* unless the statute created in its absence is legislation that Congress would not have

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[31] In addition to the district court decisions in these cases (see Pet. App. 61a-66a; 95-1503 Pet. App. 46-49), see *McGee* v. *United States*, 863 F. Supp. 321, 327 (S.D. Miss. 1995), aff'd *sub nom. Koog* v. *United States*, 79 F.3d 452, 462-463 (5th Cir. 1996), petition for cert. pending, No. 95-2052; *Frank* v. *United States*, 860 F. Supp. 1030, 1044 (D. Vt. 1994), aff'd in part, rev'd in part, 78 F.3d 815 (2d Cir. 1996), petition for cert. pending, No. 95-2006; *Romero* v. *United States*, 883 F. Supp. 1076, 1088-1089 (W.D. La. 1994), appeal pending, No. 95-30355 (5th Cir.).

enacted." *Alaska Airlines*, 480 U.S. at 685 (emphasis added). Petitioners' burden of demonstrating inseverability is especially heavy here, because the Gun Control Act, of which the Brady Act is a part, contains an express severability provision. See 18 U.S.C. 928; p. 2, *supra*. That provision creates a presumption of severability that may be overcome only by "strong evidence" of a contrary congressional intent. *Alaska Airlines*, 480 U.S. at 686.[32]

2. Without the "reasonable effort" requirement of Section 922(s)(2), the remainder of the interim scheme would be fully operative as a law. Gun dealers could readily inform CLEOs of proposed gun transfers, as required by Section 922(s)(1)(A)(i), and CLEOs who would conduct background checks voluntarily (even on an occasional basis) would find the information provided by the dealer

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[32] Petitioner Printz erroneously relies on *Alaska Airlines* (Br. 47-48) for the proposition that the general severability provision of the GCA does not apply to the Brady Act because the Brady Act added a "new program." In *Alaska Airlines*, the Court expressed doubt about the applicability of the preexisting severability clause of the Federal Aviation Act of 1958 (FAA) to the challenged provisions of the Airline Deregulation Act of 1978 (ADA), because, although other parts of the ADA did amend the FAA, the challenged provisions did not do so. See 480 U.S. at 686-687 n.8. The Brady Act, by contrast, was enacted as an amendment to the Gun Control Act, and became an integral part of it. Section 102(a)(1) of the Brady Act begins, "Section 922 of title 18, United States Code, is amended by adding the following:", after which it enacts into law a new Subsection 922(s) of Title 18. See Pet. App. 76a; 107 Stat. 1536. The GCA comprises Sections 921 through 928 of Title 18. Section 922, before passage of the Brady Act, included a lengthy list of prohibited acts. The Brady Act made the firearms dealer's failure to wait five days or the result of a CLEO's record check before transferring a handgun one of those prohibited acts. See 18 U.S.C. 922(s)(1). Cf. *Leavitt* v. *Jane L.*, 116 S. Ct. 2068, 2070 (1996) (noting that the severability provision of the Utah abortion code predated the provisions invalidated by the Tenth Circuit, which were enacted as amendments to that code, and held severable by this Court).

useful in conducting the check. The five-day waiting period imposed on dealers by Section 922(s)(1)(a)(ii)(I) would provide the CLEO with a reasonable time in which to conduct the check, and the dealer would be allowed to transfer the weapon after five business days had passed, as is the case with the mandatory record check enacted by Congress. Moreover, a CLEO would have to provide written reasons for rejecting a handgun transfer, under Section 922(s)(6)(C), only if the CLEO voluntarily chose to conduct a record check.

Such a regime would further one of Congress's leading purposes in enacting the Brady Act—ensuring, through record checks, more effective enforcement of the Gun Control Act's prohibitions on transfers of firearms to felons and others. With the waiting period and background information supplied by the dealers, CLEOs would have the time and information necessary to perform those record checks if they chose to do so. CLEOs might well conduct such checks voluntarily to prevent unlawful transfers. See House Report 13, 14 (noting support of the Fraternal Order of Police, the International Association of Chiefs of Police, and other law enforcement groups for record). Thus, the situation here is analogous to that in *New York*, where the Court found the invalid parts of the statute severable because Congress's "overall intent" would not have been frustrated by leaving the valid provisions in force. 505 U.S. at 186.[33]

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[33] Severance of the invalid parts of the Act would also further Congress's intent to provide a cooling-off period for gun sales to reduce crimes of passion. Brady Act supporters saw the cooling-off period as a significant benefit of the legislation. See, *e.g.*, 139 Cong. Rec. S16,323 (daily ed. Nov. 19, 1993) (statement of Sen. Kohl); *id.* at S16,319 (statement of Sen. Murray); *id.* at S16,324 (statement of Sen. Lautenberg); *id.* at H9089 (daily ed. Nov. 10, 1993) (statement of Rep. Derrick); *id.* at H9106 (Rep. Roukema); *id.* at H9110 (statement of Rep. Schenk).

Petitioners rely primarily on the self-evident fact that Congress preferred a mandatory record check to an optional check. The question here, however, is not whether Congress wanted the mandatory check that it enacted into law; plainly it did. Rather, the issue is whether it is clear that Congress would have preferred no law at all to a voluntary record-check provision and the five-day waiting period needed for those checks to be conducted. See *New York*, 505 U.S. at 186; *Alaska Airlines*, 480 U.S. at 684. It is hardly "evident" that Congress, deeply concerned about the national "epidemic of handgun violence," would have rejected a voluntary record check had it been clear that such was the only option available to it.[34]

Petitioners note that the 102d Congress considered, but did not enact, a version of the Brady bill that did not contain a mandatory record check provision. The failure of a different Congress to enact different legislation does not provide the strong evidence needed to defeat the

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Congress also expressed its support for cooling-off periods by defeating amendments intended to preempt state waiting periods enacted for that purpose. See 139 Cong. Rec. S16,307-S16,321 (daily ed. Nov. 19, 1993); *id.* at H9141 (daily ed. Nov. 10, 1993).

[34] Petitioner Printz's reliance (Br. 48-50) on *Leavitt* v. *Jane L.*, 116 S. Ct. 2068 (1996), is misplaced. First, the *Leavitt* decision applied Utah severability law. *Id.* at 2069. Second, to the extent that *Leavitt* is relevant, it supports a holding that the challenged provisions of the Brady Act are severable. In reversing the Tenth Circuit, which had refused to sever provisions of a Utah statute, this Court explained:

> Every legislature that adopts, in a single enactment, provision A plus provision B intends (A + B)[.] * * * The relevant question * * * is not whether the legislature would prefer (A + B) to B, because by reason of the invalidation of A that choice is no longer available. The relevant question is whether the legislature would prefer not to have B if it could not have A as well.

Id. at 2071.

presumption of severability. See *Alaska Airlines*, 480 U.S. at 686. Petitioners speculate that, of the numerous possible reasons that the earlier bill did not pass, one—the failure to include a mandatory check—was decisive. Such speculation is precarious at best; indeed, the 102d Congress failed to approve the Brady Bill even after the mandatory record check provision was inserted. See H.R. Conf. Rep. No. 405, 102d Cong., 1st Sess. 24 (1991). In the end, Congress's failure to enact a prior version into law reveals nothing about its intent with respect to severability, and certainly nothing so relevant as its *express* severability provision.[35]

3. There is also no reason to conclude that the *de minimis* record destruction requirement of Section 922(s)(6)(B)(i) cannot be severed from the separate requirement that firearms dealers provide CLEOs with information about prospective purchasers. Petitioner Printz suggests (Br. 39-42) that the latter requirement, without the former, would be contrary to Congress's

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[35] Cf. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 382 n.11 (1969) ("unsuccessful attempts at legislation are not the best of guides to legislative intent"). Petitioners seek to draw support from the fact that a handful of legislators stated that the mandatory check was decisive in their support of the bill. That evidence, however, does not override the more persuasive point that, even without a mandatory record check, the rest of the Brady Act would further Congress's objectives. See *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188, 1191-1192 (5th Cir. 1984) (act severable even though a legislator opined both that unconstitutional provision was "integral" to the act and that the act's lack of severability clause was intentional). Moreover, since Congress did enact the mandatory provision, it is unsurprising that legislators who would have also supported a waiting period and voluntary record check as a second-best preference did not speak to that point.

refusal to establish a national system of gun registration. Congress's intent with respect to *federal* gun registration is irrelevant, however, for under the Brady Act, the dealer sends the background information to the CLEO, not to a federal official. The CLEO would remain free to use that information in a voluntary record check. Moreover, the Brady Act separately restricts CLEOs' authority to use the information for any purpose other than conducting a record check. See 18 U.S.C. 922(s)(6)(B)(iii).

Petitioners' severability argument also fails with respect to the requirement that CLEOs provide reasons on request if the background check reveals disqualifying information about the transferee. If the Court were to find the "reasonable effort" provision unconstitutional, a CLEO would only be called upon to explain the results of a record check if the CLEO first voluntarily decided to conduct such a check. Thus, if the "reasonable effort" provision is removed, the written reasons requirement effectively becomes optional. Second, Congress might well have believed that, even if a CLEO voluntarily conducted a record check and found disqualifying information about the transferee, the transferee would be entitled to an explanation of that information as a matter of fairness.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1996

SHERIFF RICHARD MACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUMMARY OF ARGUMENT

In briefing *New York*, the United States projected for the Court its vision of the quintessential Tenth Amendment violation: compelled State "implementation of federal policies regulating private activity, which would transform state administrative bodies into 'field offices of the national bureaucracy.' " Brief of the United States, *New York v. United States*, at 36-37. The United States here reverses that understanding: compelled State implementation of Federal policy is now an exemplar of cooperative federalism.

As we have demonstrated, 18 U.S.C. §922(s) requires Petitioner to divert resources for which he is accountable, to exceed the powers of his office, and to violate State law. He, a State officer, must consult Federal databases to ensure that Federal licensees conform to Federal law. The sole compensation given by Congress is an exposure to civil liability for error.

The United States concedes that it may not require a State legislature to act through its servants, but contends it may render that limitation superfluous by directly commanding the servants. The justification is Orwellian. Congress "respects" the role of State legislatures by usurping their constitutional functions. It "protects" their sovereignty by ordering their servants to disregard their laws. It "accepts" accountability for a program by commanding others to pay its costs. It "avoids" the creation of a national police force by nationalizing all police. More is less, usurpation of authority is deference to it, lack of discretion is freedom, shifting of blame is acceptance of responsibility.

The position of the United States seeks to nullify the results of 1787, claiming far more than even a "negative" upon State law. Its acceptance would moot the protections of *New York* and open the door to unrestricted Federal appropriation of State manpower and budgets.

ARGUMENT

I

18 U.S.C. §922(s) Violates Principles of Federalism Underscored By The Tenth Amendment.[1]

A. 18 U.S.C. §922(s) Cannot Be Justified Under Decisions Antedating *New York v. United States*, 505 U.S. 144 (1992).

1. Statutes Generally Applicable, Or Allowing Valid Alternatives.

The United States recognizes the limitation of *Garcia* to statutes of general applicability, and concedes that 18 U.S.C. §922(s) is not such a statute. Resp. Br. at 23.[2] It

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[1] Amicus AFL-CIO argues that county officials cannot raise Tenth Amendment objections. Yet this objection was posed by a metropolitan agency in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 70 (1984), by judges in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and by counties in *New York*. Moreover, the statute here singles out "CLEOs" for its commands: Sheriff Mack has sued individually and in his capacity as CLEO. *See* Amended Complaint. Sheriff Mack further contests whether the Commerce Clause authorizes the duties placed upon him. *See also* App. 33-35.

[2] The United States contends the reason such statutes are permissible is that they involve "a clearly articulated federal

does not contest that 18 U.S.C. §922(s) denies a State the ability to avoid its mandate by altering or abandoning regulation of commerce. *Compare Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

2. Statutes Requiring Non-Discriminatory Application By State Adjudicators: *Testa* and *FERC*.

Petitioner demonstrated that the holding of *Testa v. Katt*, 330 U.S. 386 (1947), is limited to State courts having "adequate and appropriate jurisdiction under established local law" to handle claims similar to those posed by the Federal law in question. 330 U.S. at 394. Under *Testa*, "the federal law takes the state courts as it finds them." *FERC v. Mississippi*, 456 U.S. 742, 774 (1982) (Powell, J. concurring in part).

Respondent does not dispute that this standard is inapplicable to Sheriff Mack, who has no State adjudicatory powers and whose unit of government is expressly forbidden to regulate in this area. Respondent instead advances a sweeping, indeed almost unlimited, reading of *FERC*.

FERC invoked three justifications to uphold various parts of PURPA: the power to pre-empt State regulation of commerce; a *Testa* rationale, based on the Supremacy

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policy." Resp. Br. at 23. But *Garcia* cites, as good law, the result in *Coyle v. Oklahoma*, 221 U.S. 559 (1911). 469 U.S. at 556. The law stricken in *Coyle* involved the clearest possible statement of Federal policy: the capital of Oklahoma shall not be relocated prior to January 1, 1913. 469 U.S. at 564.

Clause; and a *Hodel* rationale, based on ability of the State to avoid the mandate by withdrawing from regulation. Respondent does a delicate minuet among these sections. Its dancing partners are a pair of straw men.

The United States initially contends that *FERC*'s upholding of the "mandatory consideration" portion of §210 involved a broad holding that *any* State executive officials can be required to execute Federal law *vis-a-vis* their constituents. Resp. Br. at 18.[3] The claim ignores the Court's pivotal conclusion that the utility commission's adjudicatory duty was " 'functionally comparable' to that of a judge," 456 U.S. at 760-61 n.24. The same cannot be said of an Arizona sheriff. The officials did have *other*, truly executive, functions, but *FERC* discarded these as "of no significance" to the issue before the Court. 456 U.S. at 760.[4]

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[3] The United States suggests that *FERC* cannot be limited to adjudicators, since the Supremacy Clause binds all officials. Resp. Br. at 18, n.9. The Supremacy Clause refers, however, to laws made pursuant to the Constitution: the argument is circular.

Respondent quotes, not the Supremacy Clause, but a truncated version of the Oaths Clause which omits the italicized words: "*The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and* all executive and judicial officials, shall be bound by Oath or Affirmation, to support this Constitution. . . . " U.S. Const., Art. VI, cl.2. The redaction obscures the clash with Respondent's construction of *New York* as protecting legislative but not executive functions.

[4] Respondent analogizes the situation to that posed by a Federal limitation on product liability. Resp. Br. at 16 n.7. A closer analogy would be a Federal command that county attorneys and their investigators examine all product liability

Respondent turns next to *FERC*'s treatment of the remaining, "implementation," mandates. It contends that the State's ability to avoid these by ceasing to regulate interstate commerce "played no role in the Court's analysis." Resp. Br. at 19 n.10. Of course: the "implementation" mandate was not sustained on that basis but under a *Testa* rationale, *FERC*, 456 U.S. at 759-60. It was of the *remaining* sections of PURPA that the Court noted: "[I]f a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals," *Id.* at 764.

Testa and *FERC* are thus completely inapposite to the mandate now before the Court. Sheriff Mack's State duty is not "functionally comparable to that of a judge." Unlike a court, he is held accountable for the use of prosecutorial discretion and for focusing his resources on the right priorities. Unlike a court of general jurisdiction, the Sheriff's Office is not engaged in resolution of legal disputes and cannot "simply open[ ] its doors to claimants." *FERC*, 456 U.S. at 760. Its functions are specified in statute, and are limited to specific enforcement functions such as apprehending offenders, preventing affrays, and supervising the jail. A.R.S. §11-441. Even the governmental unit it serves has only the powers delegated by statute; these are precisely given and narrowly construed. *Davis v. Hidden*, 124 Ariz. 546, 606 P.2d 36 (1979).[5] Indeed,

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cases, determine which would be barred by the Federal statute, and intervene to move for their dismissal.

[5] *See also* Op. Ariz. Att'y Gen. 68-14 (county has no power to impose curfew law); Op. Ariz. Att'y Gen. 57-60 (no power to impose regulations against public intoxication); Op. Ariz. Att'y Gen. 57-23 (no power to require fencing of land).

Sheriff Mack and his county have long been forbidden to consider analogous state policy issues. *See* A.R.S. §13-3108 (barring county from regulating firearms sales).

B. 18 U.S.C. §922(s) Violates The Parameters Of Federalism As Recognized By This Court In *New York v. United States.*

1. 18 U.S.C. §922(s) Imposes Substantial, Non-ministerial Duties Upon State Officials, In Violation of the Tenth Amendment.

Respondent contends that the duties of the CLEO are minimal, Resp. Br. at 32 *ff.*, although it does not contest the evidence below that they imposed 1-2 man-hours work per day on Mack's small and overstretched office. To meet only the minimum standard, 18 U.S.C. §922(s)(2), 59 Fed. Register 9498 (Feb. 28, 1994), Sheriff Mack must for each request initiate computer contact with two Federal criminal databases plus his own State database.[6]

A "hit" may only begin the CLEO's task. A felony conviction is no bar if civil rights have been restored, 18 U.S.C. §921(a), and to deny a purchase improperly subjects the CLEO's jurisdiction to a federal cause of action. 18 U.S.C. §925A. Under applicable Ninth Circuit law, a CLEO would be required to assess an out-of-state restoration to determine whether residual restrictions on voting,

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[6] During the pendency of this appeal, Respondent has worked to bring still more databases within the CLEO's duties. *See* 60 Fed. Register 10,784 (Feb. 27, 1995) (Requiring aliens to report their registration number on Brady form, to "enable INS to conduct computer checks" at CLEO request).

jury duty, or public employment treat the recipient as "less than a full member of society." *United States v. Oman*, 91 F.3d 1320, 1322 (9th Cir. 1996).

If duties imposed are not minimal, they are also not ministerial. A comparison with *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), is instructive. *Branstad* held that mandamus would lie to enforce the duties expressly placed on State executives by the Extradition Clause, U.S. Const. Art. IV, §2. The Court noted:

> . . . [T]he nature of the obligation here is to avoid many of the problems with which federal courts must cope in other circumstances. That this is a ministerial duty precludes conflict with essentially discretionary elements of state governance, and eliminates the need for continuing federal supervision. . . .

483 U.S. at 228. The duty at issue in *Branstad* was indeed ministerial: upon receipt of a certified copy of an indictment, the State must cause the named person to be arrested and held. 18 U.S.C. §3182. It required no discretion: one simply detains the person named, leaving to the requesting State the responsibility for indicting the correct person.

18 U.S.C. §922(s) stands in sharp contrast. Under it, CLEOs must annually make a "reasonable effort" to screen millions of individuals, who are not even suspects, against a number of criteria. He must veto any purchases which he has a "reasonable basis to believe" may be barred. App. to Brief for United States, No. 95-1478, at 16a-17a. *Even the non-criminal criteria encompass*

approximately one-eighth of the adult population.[7] As shown above, a "hit" requires further investigation, balancing of evidence, and research. The very requirement that the CLEO furnish a justification for denial, in turn subject to judicial review, underscores the discretionary and sensitive nature of his acts. The conflict with discretionary elements of State governance, and the necessity of continuing oversight, is clear.

2. The Attempt to Distinguish *New York* Fails.

The United States contends that *New York* forbids its commanding a State to make policy,[8] but leaves almost unlimited scope to order State officials to execute Federal policy on the State's time.[9] The distinction is contrary to history, precedent, and reason.

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[7] An estimated 19,500,000 American adults are forbidden to purchase due to non-conviction disabilities. The roster ranges from 14 million users of controlled substances and 2.3 million undocumented aliens, to 20,000 persons with dishonorable discharges and 9,800 who have resigned their citizenship. Identifying Persons, Other Than Felons, Ineligible to Purchase Firearms: A Feasibility Study (Bureau of Justice Statistics, May 1990) at xiv.

[8] Respondent is driven to equivocation, in an unsuccessful attempt to find a description applicable to Sheriff Mack yet inapplicable to the facts of *New York*: "to legislate," to "make policy," to "use a State law mechanism," to devise "regulatory approaches." Resp. Br. at 16, 20, 22.

[9] The United States suggests, in the hypothetical, that Congress might be barred from imposing "intolerable burdens." Resp. Br. at 31 n.22. Amici Maryland, *et al.*, would draw the line when the Federal law impairs "structural integral operations in areas of the traditional governmental functions." Amici Br. at 15.

a. Respondent's Enact/Enforce Distinction Is Contrary To The Historical Record.

In creating our federal system, the Framers rejected alike Hamilton's proposal for Federal appointment of governors and Pinckney's call for State enforcement of Federal decisions. Even drafters of the early – and broad – versions of the Virginia Plan considered application of national powers to the State executive *more* problematical than their application to the legislature. In April, 1787, Madison advised Washington that he considered the negative on State legislation as "absolutely necessary," but that "the national supremacy in the Executive departments is liable to some difficulty, unless the officers administering them could be made appointable by the Supreme Government." 1 Letters and Other Writings of James Madison 288-89 (1865). The Convention agreed, rejecting proposals to have Federal law "carried into execution" by State executives. *New York*, 505 U.S. at 164-66. Forced execution posed, in its most aggravated form, the problem of "coercion" which the Convention sought to avoid.

We presume that neither the United States nor its amici seek an overruling of *Garcia*: yet *Garcia* turns precisely on the conclusion that this manner of reasoning formed an unworkable basis for a jurisprudence of federalism.

b. Respondent's Enact/Enforce Distinction Runs Contrary To The Holding of *New York*.

As Petitioner demonstrated, Pet. Br. at 27, the statute at issue in *New York* gave three alternative modes of compliance, two of which (executing a compact or using State facilities for disposal) required no State regulation of private conduct. This Court explained its used of "administer" when it held all three alternatives deficient: "This line of reasoning, however, only underscores the critical alternative a State lacks: A State may not decline to administer the federal program." 505 U.S. at 176-77.

The United States attempts to evade this clear counsel by suggesting that the *New York* statute involved compulsion "to create a State law mechanism to address the national problem." Resp. Br. at 22. It sidesteps –over a cliff. 18 U.S.C. §922(s) has precisely the effect described: State officials are compelled to resolve a problem foist upon them by Congress, and are held accountable for paying the resulting expenses, diverting the necessary manpower, and accounting to the voters for the priorities that consequently remain unmet. Sheriff Mack has no budget or mechanism for the required actions. J.A. at 9, nor can his Supervisors give him one without exposing themselves to personal liability. Pet. Br. at 7; A.R.S. §§11-641, 642.

c. Respondent's Distinction Runs Contrary To The Reasoning of *New York*.

The United States contends that accountability concerns are not raised by the statute at issue, since Congress

has dictated a "clearly articulated solution" Resp. Br. at 21. The United States misses the crux of the issue. The accountability problem recognized in *New York* did not lie in the risk that citizens would believe the State had enacted the waste disposal statute. The problem was that they would attribute to State officials the *side effects* of the statute – the location of waste sites, the necessary expenditures and taxes, and the long-term effects of liability. The statute itself – the resolution of a problem – was something for which national legislators would claim *credit*.

Here, the side effects fall *solely* upon Sheriff Mack's shoulders. He must take officers off other duties or pay overtime. He must resolve the personnel problems when deputies refuse. J.A. at 9. He must determine whether suspicions exist with regard to an applicant, and assess whether the applicant has provided sufficient evidence to overcome them. The United States thus advises Federally licensed dealers that, should the CLEO rule that a buyer is ineligible, they are no longer involved: the problem is one between the CLEO and his constituent.[10] Nor does Congress deign to support its conscript, should the finding face a legal challenge. While the Sheriff is left to

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[10] ATF advises Federally licensed firearms dealers:

> If a CLEO determines that a prospective buyer is ineligible to receive a firearm. . . . the licensee is no longer involved and the matter will be resolved by the prospective buyer and the CLEO.

60 Fed. Register 10,786 (Feb. 27, 1995).

mount and finance his own legal defense,[11] Congress awards a successful challenger costs and attorneys' fees, paid by the Sheriff's unit of government.

Congress' "clearly articulated solution" thus consists of thrusting the CLEO into disputes not of his making, abandoning him to his own devices, and encouraging all concerned to focus their grievances – and lawsuits – upon him. That the United States considers this an acceptance of responsibility says much – about its concept of accountability.

C. 18 U.S.C. §922(s) Presents a Far More Egregious Violation of Federalism Than Was Present in *New York*.

The United States – and all its amici – do not deny that 18 U.S.C. §922(s) is distinguishable from the statute invalidated in *New York* only in that it involves a more serious assault upon federalism. Pet. Br. at 30-35. 18 U.S.C. §922(s) presents aggravated problems of accountability, and it lacks even the process justifications advanced by the minority in *New York*. Rather than commanding a State legislature, Congress usurps the functions given that legislature by the people, of which the core is surely its ability to command *its own* servants and make policy regarding *its own* resources. The United States here asserts the capacity to effectively erase the

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[11] While the Sheriff might *hope* that the County Attorney would undertake his defense, the liability arises out of a Federal and not a county activity. In fact, as noted above, he undertakes the duty in violation of State law.

power and substance of the State whenever State priorities, for use of its own resources, do not agree with those of Congress.

18 U.S.C. §922(s) commands Sheriff Mack to violate the restrictions placed on his office by the people of his State. It establishes a Federal override on the people's ability to choose their officials, an ability which lies at the heart of republican government. *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900); *cf. U.S. Term Limits v. Thornton*, 115 S.Ct. 1482 (1995).

D. There Is No Historical Precedent For The Imposition Of Federal Duties Upon State Officers Pursuant To The Commerce Clause.

Respondent attempts a historical justification of its position, arguing that the first Congresses made use of State officials in achieving Federal objectives. Resp. Br. at 24-30. As demonstrated by amici Council of State Governments and Law Enforcement Alliance of America, the examples cited involved provision of *voluntary assistance* by the States to the new Republic: to help in a barn-raising does not make one a serf.[12]

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[12] The United States quotes at length the fears of Patrick Henry and other antifederalists. Br. at 26 n.13. But these stalwarts *lost* the debate of 1788, largely because the federalists argued that their fears were chimerical – at best, "the honest errors of minds led astray," Federalist No. 1 (Hamilton). On the other hand, Madison's drive for a bill of rights was largely motivated by a desire to undercut the arguments of "Mr. Henry and his friends in Virginia" for a second convention. 1 Letters and Other Writings of James Madison 418, 442-43 (1865).

1. Voluntary, Part-Time Employment Of State Employees By The Federal Government.

Respondent invokes Hamilton's suggestion, in Federalist No. 36, that the Republic might make use of experienced State officials. Resp. Br. at 27. Hamilton in fact envisioned their voluntary hiring: they will be "attached to the Union by an accumulation of their emoluments." *Id.* The early Republic took his advice – and plunged into federalism's first crisis, one contemporaneous with the Tenth Amendment's ratification. *See generally* U.S. Constitution Sesquicentennial Comm'n, History of the Formation of the Union Under the Constitution 436-45 (1941) [Hereinafter "History of the Formation"].

Virginia, under Patrick Henry's leadership, led the objectors. By act of December 8, 1788, it forbade most State officials to hold any "lucrative office" in the national government. 12 Hening's Statutes at Large 694-95. Others followed: between 1789 and 1791, legislatures in Pennsylvania, Connecticut, New York and Maine discharged State officials who accepted Federal posts. History of the Formation at 438-42.

Other States constitutionalized the prohibition. *See, e.g., Ga. Const.* Art. I §10 (1789) (legislators forbidden to hold any Federal "office of profit"), *Pa. Const.* Art. I §5 (1790) (governor forbidden to hold "any office" of United States); *S.C. Const.* Art. II §2 (1790) (holder of any State "office or commission" barred); *Md. Const.*, Amend. II (1792) (holder of any Federal "office of trust or profit" forbidden to hold any "office of trust or profit under this

State"); *Del. Const.*, Art. II §§5, 8 (1792) (governor and legislators); *Ky. Const.* Arts. I, II (1792) (same).[13]

The fate of Hamilton's suggestion over the period 1788-92 casts doubts on suggestions that the States which were then ratifying the Tenth Amendment would have intended to allow conscription of their officials.

2. Naturalization.

Naturalization was and is a judicial function involving assessment of a petition in light of the evidence. *See Stark v. Chesapeake Ins. Co.*, 11 U.S. (7 Cranch) 420 (1813). Pre-Constitutional State law commonly provided for reporting by the clerk to the executive, upon payment of a fee. *See* Laws of Session of October, 1786, Ch. 5, §2, 12 Hening's [Virginia] Statutes at Large 260-61 (clerks to give certificate to applicant and report naturalizations to the governor, upon payment of one dollar). The Constitution expressly empowered Congress to "establish an uniform Rule of Naturalization." U.S. Const., Art. I, §8, cl. 4. The Fifth Congress accordingly required clerks to certify naturalizations to the Secretary of State, in exchange for two dollars; any clerk "to whom such fee shall be paid or tendered, who shall refuse or neglect to make a certify such an abstract, as aforesaid, shall forfeit and pay the sum of ten dollars." Act of June 18, 1798, §2, 1 Stat. 567. The early naturalization laws thus involved a judicial function, an express power, and compensation.

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[13] *See* William Swindler, Sources and Documents of United States Constitutions (1973), vol. 2 at 209, 452; vol. 4 at 144-45, 384, vol. 8 at 289, 479.

In sum, the position of the United States conflicts with precedent, history, and reason – not to mention with its past positions taken in this Court. 18 U.S.C. §922(s) is violative of principles of federalism recognized by the Tenth Amendment.

II

The Commerce Power Does Not Justify A Federal Mandate That A State Official, Precluded By Statute from Interfering With Commerce, Regulate Commerce To Federal Specification.

18 U.S.C. §922(s) attempts to regulate, not commerce, nor State interference with commerce, but a State official who is *not interfering* with commerce – indeed, an official whose people have by law forbidden him to affect the relevant commerce. The command far exceeds Congressional powers.[14]

Unable to advance a justification, the United States simply claims that the argument adds nothing to the Tenth Amendment objection. Resp. Br. at 40-41. It does not contend that Sheriff Mack engages in the relevant commerce, that he regulates it, or even that he would have power to regulate it if he so chose.

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[14] The issue does not arise in pre-*New York* cases because they involved either State activity in commerce – as in *Garcia* – or States affirmatively affecting commerce through regulation – as in *FERC* and *Hodel*. Indeed, the situation here is the converse of that presented in *FERC*, and Respondent's position is the equivalent of asserting that, even if the State had no utility commission, Congress could force it to establish one so that Congress might impose mandates upon it.

New York stands for two propositions: the Commerce Clause gives Congress the power to regulate, not to command others to regulate; and the core principles of federalism specifically bar commanding *States* to regulate.[15] These are "distinct limitations on federal power," *FERC*, 456 U.S. at 773 (Powell, J., concurring),[16] and the link to the commerce power is the "jurisdictional prerequisite" in this context. *Hodel*, 452 U.S. at 311 (Rehnquist, J., concurring). If anything, the case here is clearer than that presented in *New York*. There, the State – to whom the Federal command was directed – at least had the authority to regulate the relevant commerce. Here, Sheriff Mack has none; the State laws which create his position specifically deny it the required powers.

The United States invokes the Necessary and Proper Clause, U.S. Const., Art. I, §8, cl. 18. Br. at But this is "not of itself a grant of power." *Kinsella v. Singleton*, 361 U.S. 234, 247 (1960). *Compare Solorio v. United States*, 483 U.S. 435, 441 (1987) (plenary power to regulate the "land and Naval forces") *with Toth v. Quarles*, 350 U.S. 11, 22 (1955) and *Reid v. Covert*, 354 U.S. 1, 20-21, 30 (1957) (Necessary and Proper Clause does not authorize court martial of

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[15] *New York* reminds us that, while we may refer to the latter as the Tenth Amendment bar, the limit is not derived from the text of that amendment, but from the nature of the federal system created by the Framers. 505 U.S. at 156-57.

[16] If demonstration of an Article I power necessarily defeated all federalism objections, there would have been no reason for *Garcia* to posit a "process" bar in the commerce context, nor for *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987), to posit such bars to use of the spending power.

discharged soldiers, nor of civilian dependents on overseas bases.).

III

THE UNCONSTITUTIONAL PORTIONS OF 18 U.S.C. §922(S) CANNOT BE SEVERED FROM THE VALID PORTIONS.

The United States asserts that Petitioner's severability contention involves assertion of *jus tertii*. The issue of severability was vigorously argued below, and decided by the District Court, App. at 46, without the United States raising this claim. The limitations on assertion of *jus tertii* are a prudential aspect of standing. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).[17] To allow their assertion for the first time in this Court would "foster repetitive and time-consuming litigation under the guise of caution and restraint." *Craig v. Boren*, 429 U.S. 190, 194 (1976).[18]

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[17] Insofar as the plaintiff has suffered harm in fact, whether or not that injury is justiciable. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989). Petitioner must, under severed statute, either labor, unpaid, or alienate his constituents by causing a five-day wait.

[18] The United States mechanically applies the severability clause of the 1968 Gun Control Act, 18 U.S.C. §928, Resp. Br. at 46: §922(s) is codified as an amendment to that Act, hence the severability clause must apply. But a severability clause's value lies in the guidance it gives as to legislative intent. That Congress intended the provisions of its 1968 enactment – dealer licensing, bars on prohibited purchasers, and so on – to be severable can give little guidance as to Congress's intent in 1993 when it created components of an entirely novel background check system.

A. Severance Would Yield A Statute Which Congress Refused To Enact.

The United States speculates that Congress *might have* been willing to accept a voluntary check as a lesser measure. As we have noted, the 103d Congress four times rejected a voluntary check; legislators endorsed the mandatory approach and emphasized that they were *not* voting for a waiting period or optional check. The situation presented is the polar opposite of that presented in *Alaska Airlines v. Brock*, 480 U.S. 678 (1987), where Congress "paid scant attention" to the invalid one-house veto. 480 U.S. at 691.[19]

B. Severance Would Yield A Statute With Disadvantages Which Congress Did Not Weigh.

We have noted that severance would result in a radically different cost-benefit balance, one noted by legislators, and in special disadvantages which the 103d Congress had no reason to weigh. Pet. Br. at 42-44. The United States makes no response.

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[19] Respondent suggests that legislators might have viewed the "waiting period" as an objective. But the period ends with the check, and vanishes entirely with the permanent Federal system. It is a means rather than an end, and the bill's supporters stressed that the wait would end as soon as possible. 139 Cong. Record H9101 ("5-day waiting period will sunset"); H9102 ("a Federal waiting period will disappear."); H9107-08 ("the waiting period will be eliminated"); H9129 ("Background checks work. Waiting periods do not."); H9097 ("an interim step that will sunset.").

C. Severance Would Create A Statute Containing Inconsistencies And Incongruities.

Petitioner illustrated how severance results in a statute with incongruities, *e.g.*, the Federal rule would allow a voluntary check, yet to gain exception a State must enact a mandatory check. Pet. Br. at 44-45. Amici Senators suggest – without evidence – that Congress meant to draft to the edge of its constitutional power. Amici Br. at 25, n.14. Yet comparison with the H.R. 7 shows that, when Congress *did* intend to impose a voluntary Federal check, it *did* reconcile the provisions, exempting any State with a waiting period that enabled a voluntary check. H.R. 7, 102d Cong., 1st Sess., §2(a).

CONCLUSION

18 U.S.C. §922(s) exceeds commerce powers and violates core principles of federalism. It must be stricken in its entirety.

Respectfully submitted,

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Attorney for Petitioner

Supreme Court, U.S.
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No. 95-1478
No. 95-1503

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JAY PRINTZ, Sheriff/Coroner, Ravalli County, Montana;
SHERIFF RICHARD MACK, Graham County, Arizona,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE, LAW ENFORCEMENT ALLIANCE OF AMERICA

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INTEREST OF THE AMICUS CURIAE

The Law Enforcement Alliance of America (LEAA) is a not for profit corporation, organized under the laws of the Commonwealth of Virginia. It has approximately 50,000 members, 85% of whom are sworn law enforcement officers. Some of these are Chief Law Enforcement Officers (CLEOs) under the terms of the Brady Act. Others will be designated to act in the place of the CLEO. In their capacity as law enforcement officers, LEAA members will be directly affected by the provisions requiring ministerial acts of CLEOs. Sheriff Richard Mack, one of the Appellants in this case, has been a member of LEAA for many years.

Further, most LEAA members are gun owners, and are directly affected by issues touching upon the private ownership of firearms.

THE QUESTION PRESENTED

Whether the delegated powers of Congress, as construed in *New York v. United States*, 505 U.S. 144 (1992), include the power which Congress exercised in the Brady Law, 18 U.S.C. §922(s)(2), (6)(B) and (C), to prescribe duties for state Chief Law Enforcement Officers (CLEOs), beyond those duties prescribed in the state laws which created their positions, including compelling the CLEO to make a reasonable effort to ascertain whether individuals may lawfully purchase handguns; thereafter to destroy the records of such transaction, or to provide a written explanation for an adverse determination.

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STATEMENT OF THE CASE

A. Position of the Amicus.

The question presented in this case has been reviewed in three Circuits. The Ninth Circuit, in *Mack v. U.S.*, and *Printz v. U.S.* , 66 F.3d 1025 (9th Cir. 1995), and the Second Circuit, in *Frank v. United States*, 78 F.3d 815 (2d Cir. 1996), each held that the duties which the Brady law compels Chief Law Enforcement Officers (CLEOs) to perform did not violate the 10th Amendment, or exceed the delegated powers of Congress. On the other hand, the Fifth Circuit, in *Koog v. U.S.*, and *McGee v. U.S.*, 79 F.3d 452 (5th Cir. 1996), held that the interim duties, including the duty to perform a background check, the destruction of records and the duty to furnish written justification for denials, violate the constitution.

The Law Enforcement Alliance of America (LEAA) supports the position of the Appellants, Sheriff Mack and Sheriff Printz. We believe that the Brady Law is unconstitutional. It is not a command from a sovereign power to all who owe a duty of obedience to it. Rather, it is a set of commands from one sovereign, which are addressed to officers who are commissioned and set in place by a separate and distinct sovereign. Obedience to these commands, by those to whom they are addressed, is contemplated precisely because of their character as servants of a separate sovereign. The Act provides criminal penalties for officers who fail to put forth a "reasonable effort" to obey its commands, without providing any guidance as to what might be considered "reasonable." In sum, it is a law of doubtful constitutional pedigree which threatens law enforcement officers with criminal penalties for failure to meet an unknown standard of performance.

B. Background of the litigation.

Federal law prohibits the transfer of firearms to, or possession by, members of certain classes of restricted persons, including, *inter alia*, convicted felons, persons dishonorably discharged from the armed forces, adjudicated mental defectives, illegal aliens, unlawful drug users, fugitives from justice, and persons under certain forms of domestic restraining orders. 18 U.S.C. §922(d), (g), & (n).

In 1993 Congress enacted the "Brady Law," Pub. L. 103-159, 107 Stat. 1536 (1993), which provides for an official verification, through an examination of available records, of the proposed purchaser's eligibility to possess a firearm. To this end, the law requires the U.S. Justice Department to establish a data base of prohibited persons by the year 1999. Before that time, the law creates an interim system which requires that the background investigations, on persons seeking to purchase handguns, be conducted by the "Chief Law Enforcement Officer" (CLEO) for the district in which the proposed purchaser resides. The phrase "Chief Law Enforcement Officer" is defined, at 18 U.S.C.§922(s)(8), as "...the chief of police, sheriff, or an equivalent officer or the designee of any such individual." None of these offices are created under the Federal Constitution, and none of these officers are servants of the Federal Government. LEAA estimates there are approximately 18,500 local and state police agencies in the United States. In addition, according to the National Sheriff's Association, there are 3,095 Sheriff's. Thus, the statute purports to cover approximately 21-22 thousand individuals as Chief Law Enforcement Officers (CLEO).

During the operation of the interim system, the proposed purchaser must fill out a form indicating an intent to purchase a handgun. The dealer must submit this information to the Chief Law Enforcement Officer of the place where the proposed purchaser resides. 18 U.S.C. §922(s)(1)(A)(iii). The CLEO is required to make ". . . a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. §922(s)(2). The U.S. Attorney General has designated two Federal databases as the "national system" which the CLEO must check. Order No.1853-94, at 59 *Federal Register* 9498 (Feb. 28, 1994).

If the CLEO finds that the proposed sale would not violate Federal, State or local law, he is required to destroy the form and any references to it within twenty business days. 18 U.S.C. §922(s)(6)(B). On the other hand, if the CLEO finds that the proposed purchaser is ineligible to receive a handgun, he must inform the dealer and, if the purchaser requests, provide a written justification of his findings within 20 business days. 18 U.S.C. §922(s)(6)(C). Should the CLEO err in barring a purchase, the statute creates a Federal cause of action against his jurisdiction for correction and recovery of attorneys' fees. 18 U.S.C. §925A.

The Act does not define "reasonable effort." At a minimum, a "reasonable effort" must include a search of the two Federal databases, as well as any state and local records which might be available. Further, there are some disqualifying conditions which would be difficult, if not impossible, for a CLEO to discover. For example, LEAA is

not aware of any system of records, whether accessible to law enforcement officers or not, of people who have ever renounced U.S. citizenship. LEAA does not believe that there is a registry of individuals who have received dishonorable discharges from the armed forces. Is the CLEO expected to attempt to discover such information as a part of a "reasonable effort?"

The requirement that a CLEO make a "reasonable effort" imposes a substantial burden.[1] Until the advent of the permanent system, this substantial burden, reviewing the backgrounds of three to four million handgun purchases per year, will continue to fall upon the shoulders of local law enforcement officers.

The burden is made more substantial by the fact that a law enforcement officer who does not perform the duties imposed by the Brady Law faces criminal penalties. It is true that the record contains a memorandum from the Office of Legal Counsel at the Justice Department, issued March 16, 1994, in which the Assistant Attorney General expresses the view that the criminal sanctions of 18 U.S.C. §924(a)(5) were not meant to apply to CLEOs. We are not assured. This memorandum is only an opinion *to* the Attorney General, not one *of* the Attorney General. It is advisory only, and binds no one. It can be revised or retracted at any time.

In the Old Testament there is the story of Joseph, who became the Prime Minister of the Pharaoh, and whose people

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[1] Interestingly, when Congress was considering the Brady Bill, it was suggested that Federal Agents might perform the background checks. This was rejected because it would have been too burdensome upon the Federal Agents. H.R. Rep. No. 103-344, 103rd Cong., 1st. Sess., at 7 (1993).

prospered in Egypt. Then, as it says in Exodus 1:8, "(t)here arose a new king in Egypt who knew not Joseph." If LEAA members can place any confidence in the claim that they are not subject to criminal penalties, they can only do so until there is "a new king in Egypt," that is, until there is some change, either a change of heart or a change in personnel, at the Department of Justice, after which law enforcement officers would again be subject to the criminal penalties provided in the Act.

Such revision has happened in the past. This Act will be administered the Bureau of Alcohol, Tobacco and Firearms (BATF). Congress has documented the fact that these officials have been known to announce that an action was legal, and then prosecute the same act following a "change of management."[2] The memorandum gives us no assurance that

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[2] "The Constitution Subcommittee also received evidence that the Bureau has formulated a requirement, of which dealers were not informed, that requires a dealer to keep official records of sales even from his private collection. BATF has gone farther than merely failing to publish this requirement. At one point, even as it was prosecuting a dealer on this charge (admitting that he had no criminal intent) the Director of the Bureau wrote Senator S.I. Hayakawa to indicate there was no such legal requirement and that it was completely lawful for a dealer to sell from his collection without recording it." Subcomm. on the Constitution, Sen. Judiciary Comm., The Right to Keep and Bear Arms 97th Cong.2d Sess. at 22 (1982). The case referred to is documented at Hearings on S. 1030 before the Senate Judiciary Comm, 97th Cong. 2d Sess. at 60-62 (1982); one director of the prosecuting agency opined that the questioned conduct was and had always been legal; his replacement, in a statement filed with the court, avowed that this was a mistake.

LEAA members would not be subject to criminal prosecution.[3]

In the event of future prosecutions, we note that the performance commanded by the statute, "a reasonable effort," is nowhere defined. The sworn members of LEAA may, at any time, be asked to perform as the "designee" of a Chief Law Enforcement Officer. Thus, our members would be subject to prosecution for knowingly violating an unknowable standard.

Finally, if the memorandum is correct, LEAA members may face *greater*, not lesser, legal jeopardy. If the special penalty clause of 18 U.S.C. §924(a)(5) does not apply, then a violation of 18 U.S.C. §922(s) is punishable under 18 U.S.C. §924(a)(1)(D)(Supp. 1992), the "catchall" clause which provides felony sanctions for anyone who "willfully violates any other provision of this chapter."

Some CLEO's do not object to this burden. Others, such as the Appellants in this case, do object. The Law Enforcement Alliance of America, with its 50,000 members, supports the position taken by the Appellants in this litigation. In our view, whatever the merits or demerits of background checks, Congress has no constitutional authority to place this burden upon state and local law enforcement officers.

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[3] In any case, the Office of Legal Counsel has overlooked the legislative history. In fact, proposals to make the background check *optional* for CLEOs were considered and *rejected* in both the Subcommittee on Crime and the House Judiciary Committee. Congress' rejection of the amendment makes no sense unless the result was intended to mean exactly what it says: CLEOs must carry out the program or risk sanctions. We cannot safely assume that future officials will overlook the statutory history.

ARGUMENT

I

THE BURDEN WHICH THE BRADY LAW IMPOSES UPON CHIEF LAW ENFORCEMENT OFFICERS VIOLATES THE PRINCIPLES OF FEDERALISM

A Member of the British Parliament, writing of the U.S. Constitution, during the last century, observed:

> ". . . the men of 1787, feeling the cardinal importance of anticipating and avoiding occasions of collision, sought to accomplish their object by the concurrent application of two devices. One was to restrict the functions of the National government to the irreducible minimum of functions absolutely needed for the national welfare, so that everything else should be left to the States. The other was to give that government, so far as those functions extended, a direct and immediate relation to the citizens, so that it should act on them not through the States but of its own authority and by its own officers.

J. Bryce, 1 *The American Commonwealth*, (1888), at 318.

As this Court noted in *New York v. United States*, 120 L. Ed.2d 120 (1992), there were proposals in the Constitutional Convention to have federal law "carried into execution by the judiciary and executive officers of the respective states," but these proposals were rejected. *Id.*, at 143. Madison announced that the practicality of having federal laws bind "the states as political bodies, has been exploded on all hands." *Id.*

The Convention instead opted for independent sovereigns with parallel lines of authority to the individual. To Congress went limited powers, backed by the Supremacy Clause, within their sphere. To the states were reserved all other powers, to the extent they did not conflict with the limited national ones.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people....

The Federalist No. 45 (Madison) at 292-93 (C. Rossiter, ed. 1961).

Behind this division lay not only practical judgments, but a good deal of history. A central precept of Anglo-American political thought had long been that sovereignty was indivisible. A nation-state had but one repository of the sovereign power. Within the nation-state one was either the sovereign or a subordinate, no person or entity might be both. *See,* C. Rossiter, *The Political Thought of the American Revolution*, ch. 10 (1963). To speak of a subordinate sovereign, a ruling power within a ruling power, an *imperium in imperio*, was to display political ignorance. *See,* B. Bailyn, *The Ideological Origins of the American Revolution*, (1967), at 198-229.

The way to sidestep this barrier lay in the concept, derived from Locke and implicit in pre-Revolutionary American thought, of the people themselves as the ultimate repository of *imperium*. E. Morgan, "The American Revolution Considered as an Ideological Movement," in *Causes and Consequences of the American Revolution*, 172, 178-79, (1966). The people might then divide their *imperium* among two units of government, provided that each had a distinct responsibility. "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." *Federalist No. 46* (Madison) at 294 (C. Rossiter, ed. 1961). To this theoretical base the Framers added practical counsel: to expect one sovereign to govern another is to invite conflict and chaos. Hamilton thus stressed the ability of the federal system to overcome both theoretical limitations and practical risks, by having each sovereign govern individuals:

> [A] sovereignty over sovereigns, a government over government, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity, by substituting violence in place of the mild and salutary coercion of the magistrate.

Federalist No. 20, at 138.

The leaders of the early Republic knew and grasped these distinctions. In the Ninth Circuit, Respondents and their *amici* attempted to assert historical precedent contradicting the clear results of 1787. *See* Brief for the United States, *Mack v. United States*, at 14*ff*. Their invocations, placed in correct historical context, fail to support their claims, which this Court in any event rejected in *New York*. It is no accident that the bulk of their claims arise from proposals for collection of

revenue, and none involve the commerce power. During the debates of 1787-88, the power over revenue was one of the most confused areas of discourse. Congress had, of course, the power to raise money; most envisioned that the bulk of its funding would come from customs levies; few had any clear idea of what laws the Congress might choose to enact if these proved insufficient. The debate was thus exceptionally prone to lapse into speculation and hypothetical fears. Moreover, the proposed Constitution itself did seem to envision that any direct tax needs would be apportioned out to the states: Art. I, §9 provided that "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

In *The Federalist No. 45,* at 292, Madison mentions the possibility that State officers might be used to collect federal taxes. The context however, shows that Madison has in mind the possibility of federal authorities simply asking states to contribute their quota of the federal needs, and subsequently using their own officers to collect any shortfall.

Madison envisions a system where the first recourse would be to excises; the second to "quotas" of tax figures apportioned among the states and remitted by them; the third a special state levy or surcharge on behalf of the federal government. The national government has the power to collecting internal taxes, he informs his readers, but it

> ....is probable that this power will not be resorted to, except for supplemental purposes of revenue; that an option will then be given to the states to supply their quota by previous collections of their own; and that the eventual collection, under the immediate authority of the Union, will generally be made by their own

> officers, and according to the rules, appointed by the several States.

Id. at 292. Madison continues that, in the event these additional collections are needed, it might be advisable (in modern terms) to "cross-deputize" the officers: thus state officials may be "clothed with the corresponding authority of the Union." *Id.* Such deputization would, of course, be a *grant* of federal power to willing deputies, not a *conscription* of state power; there is nothing in Madison which suggests that he envisioned the state officials being involuntarily enrolled. Indeed, conscription would be inconsistent with the central theme of *No. 45*, which is the *limitation* of federal power vis-a-vis that of the states, and the allaying of fears of an overwhelming national government.

In *Federalist No. 36*, Hamilton joins his voice to that of Madison: federal internal taxes are unlikely; if imposed, they would best be imposed on items not taxed by states. Critics of the Constitution have, however, argued that a federal property tax might be levied, and submitted that the federal government could hardly have the local knowledge necessary to value realty: that requires "knowledge of local details" and must be set by "discreet persons in the character of commissioners of assessors." *Id.* at 219-220. In that unlikely event, Hamilton responds, there is a "practical expedient:" Congress might employ state assessors as its agents:

> In other cases, the probability is that the United States will either wholly abstain from the objects pre-occupied for local purposes, or will make use of the State officers and State regulations for collecting the additional imposition. This will best answer the views of revenue, because it will save expence in the

> collection, and will best avoid any occasion of disgust to the State governments and to the people.

Id. at 221-222. Hamilton nowhere proposes that the state officials be conscripted: that would hardly avoid "any occasion of disgust to the State governments." Rather, he suggests that the state assessors be attached "to the Union by an accumulation of the emoluments." *Id.*, at 222.

Today, the concept of state officials sharing part time federal work seems anomalous. It was not so in the 18th century, when government work at all levels was largely part time. John Jay served the United States simultaneously as Chief Justice and as Ambassador to Great Britain, Oliver Ellsworth as Chief Justice and Ambassador to France, John Marshall as Chief Justice and as Secretary of State, Roger Taney as Attorneys General and as Secretary of War. B. Schwartz, *A History of the Supreme Court*, (1993) 27-28, 73.

Dual, part-time employment was in fact attempted in the early Republic, as evidenced by the protests of some states against the voluntary hiring of their officials. *See, generally*, D. Matteson, *The Organization of the Government Under the Constitution*, 296-303 (1943, reprinted 1970). During the First Congress, Virginia voted to prohibit state officials from simultaneously holding federal jobs, and Connecticut's legislature voted to oust Jedediah Huntington from the office of treasury because he had been appointed federal collector of the port of New London, *Id.* at 296-97, 300.

Other states were less particular. In New Hampshire, Governor John Sullivan served simultaneously as federal district judge. New York's district judge served also as state judge and state senator. *Id.* at 299, 303. Congress made no

response to State prohibitions, although Madison privately complained that enforcement of the Revenue Act was being retarded by the Virginia statute. *Id.* at 297. The thought of conscripting state employees rather than hiring them did not occur to Madison nor, so far as our records reflect, to any other legislator. Voluntary employment, and that with the concurrence of the state, was the avenue pursued.

Respondent additionally invoked certain enactments of the early Republic requiring state court clerks to record petitions for naturalization and provide certificates reflecting the same. Brief for the United States at 15-16. Again, this must be placed in historical context. Naturalization was initially a state affair; the Framers were concerned by the disparate systems and standards used in various states to naturalize citizens. *See, Federalist No. 42* (Madison) at 269-70. The response was creation of a Congressional power to "establish a uniform rule of naturalization," Art. I, §8. Providing for uniform procedures to be followed was simply an effectuation of this express grant of power.

It may in any event be observed, with regard to Respondent's statutory citations, that enactment of a statute does not prove its constitutionality.[4] An early Court -- in an opinion written by John Marshall's successor -- noted that the States had often assisted in Federal administration as a matter of comity, not coercion. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 108-09 (1861) ("It is true that in the early days of the Government, Congress relied with confidence upon the

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[4] If it did, *quaere* the effect of enactment of the Alien and Sedition Act.

cooperation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, upon principles of comity ... where no such duty was imposed by the Constitution.")[5]. In particular, use of state courts to process naturalizations ceased when the states began to object.[6] That States voluntarily aided the new government should not be read as a waiver of their right to object should it, centuries later, proclaim them its serfs.

Strangely, the United States also cited as precedent the enactment of the Fugitive Slave Acts, *Brief of the United States* at 16, n.13. Apart from the fact that these were enacted pursuant to a specific grant of authority over states, Art. IV, §2, they are hardly a model of cooperative federalism. The conflict over these enactments did much to bring on exactly the internecine conflict which Madison had hoped to avoid; they are today, like other legislation of the period, "a mere preamble--a title page to a great tragic volume." C.F. Adams, ed., 4 *Memoirs of John Quincy Adams* 502 (1876).

The early Republic, like its Framers, claimed no power to conscript state officials, nor to command their acts save in

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[5] *Dennison*'s result was of course overruled in *Puerto Rico v. Branstad*, 483 U.S. 219 (1987). This has no effect on the Court's observations of the voluntary nature of state compliance in the early days of the nation.

[6] "...the naturalization act of March 26, 1790, gave state judges jurisdiction over its operation, though the citizenship conferred was federal. Later, in some states the state courts were forbidden to act in the matter and the courts decided that the prohibition was within the power of the state legislatures." Matteson, *supra*, at 296.

the rare cases where the Constitution expressly required them to follow federal standards.

II
THE BURDEN WHICH THE BRADY LAW IMPOSES UPON CHIEF LAW ENFORCEMENT OFFICERS VIOLATES THE 10TH AMENDMENT

Joseph Story made the following observation regarding the limitations to the powers of the Federal government:

> The Government of the United States is one of limited powers; and no authority exists beyond the prescribed limits, marked out in the instrument itself. Whatever powers are not granted, necessarily belong to the respective States, or to the people of the respective states, if they have not been confided by them to the State Governments.

J. Story, *A Familiar Exposition of the Constitution of the United States*, (1840), at 216.

Citizens of the United States owe allegiance to two sovereigns, the state of their residence, and the United States. The powers of the two sovereigns are different, but they are not necessarily in conflict. Chief Justice Waite, in *United States v. Cruikshank*, 94 U.S. 542 (1875), at 550, said that the powers of the Federal government "...are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States, but beyond, it has no existence."

The power to regulate the sale of firearms, if Congress has such a power, must be found in the power to regulate

interstate commerce. Article I, section 8 of the Constitution gives Congress the power "(t)o regulate Commerce with foreign Nations, and among the several States..." This is a plenary power which may extend to matters purely intrastate, and may even preempt explicit state law. See, e.g., *Fry v. United States*, 421 U.S. 542, 547 (1975); *Heart of Atlanta Hotel v. United States*, 379 U.S. 241, 262 (1964). However, the Constitution places limits upon this plenary power. See, e.g. *United States v. Jackson*, 390 U.S. 570 (1968).

Justice O'Connor, in *New York v. United States*, 120 L. Ed.2d 120 (1992), clearly defines those limits. The issue was an act regulating nuclear wastes. The act provides incentives to encourage states to perform certain functions relating to nuclear waste disposal. Justice O'Connor found no fault with these provisions. The act also provided that a state must either enact legislation which is congruent with, and complementary to, Federal regulation of nuclear wastes, or take title to all nuclear wastes generated within the state. Justice O'Connor found that this provision exceeded the limits of the authority conferred upon Congress by the Constitution. Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.

Id., at 150.

In this case, the States are presented with a choice: either enact legislation establishing an "instant check," or allocate police resources to make a "reasonable effort to ascertain...". The fact that the statute only compels individual CLEOs, rather than the state government, is irrelevant. If this construction were permitted, Congress could evade the decision

in *New York*, supra, by commanding individual members of the legislature, rather than the legislature as a whole. The Brady Act commands: either enact legislation, or implement Federal legislation. By doing so, it exceeds the limits of the authority of Congress.

The Court of Appeals for the Fifth Circuit, in *Koog v. U.S.*, 79 F. 3d 452 (5th Cir. 1996), held that the Brady Law, to the extent that it compels Chief Law Enforcement Officers to perform ministerial duties, is unconstitutional. The Fifth Circuit based its decision on the decision of this Court in *New York v. U.S.*, 120 L. Ed.2d 120 (1992), which, it said, was ". . . central to the question before us." *New York* is also central to this case.

In *New York* the issue was a challenge to the Low-Level Radioactive Waste Amendments of 1985. This statute provided several incentives to induce States to conform with the directives of the federal government on the disposal of nuclear wastes. The Act offered financial grants to States which complied. It provided for federal pre-emption in instances in which a State chose not to comply. This Court found that these provisions were within the permissible powers of Congress, and did not transgress the powers reserved under the 10th Amendment.

The Act also provided that States could choose whether to enact regulations, as prescribed by Congress, or take title to the waste from the parties who generated it, and assume liability both for the disposal of such wastes, and for any damages. This provision was found to lie outside of the enumerated powers and to be inconsistent with the Tenth Amendment.

In reaching this decision, this Court distinguished those

Tenth Amendment cases in which the issue was the authority of Congress to subject state governments to generally applicable laws. These cases include *Garcia v. San Antonio Metropolitan Transit Authority*, 469 US.. 528 (1985)(Fair Labor Standards Act); *Fry v. U.S.*, 421 U.S. 542 (1975)(wage stabilization), and *South Carolina v. Baker*, 485 U.S. 505 (1988)(tax exemption on the interest on municipal bonds). *Id.*, at 140. The Court found these cases inapposite since the legislation at issue, in *New York*, was not applicable to private parties. Instead the issue was ". . .the circumstances under which Congress may use the States as implements of regulation." *Id.*

The Court began its analysis by observing that "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.*, citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, at 288 (1981).

Congress may, however, use a variety of means to induce states to assist in regulatory programs. For example, under the spending power, "Congress may attach conditions to the receipt of federal funds." *Id.* Or Congress may offer States the choice of regulating in accordance with Congressional wishes, or having State regulation pre-empted by federal regulation. *Id.*, at 144-145.

In *Hodel*, and in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (FERC), there were incentives offered to the States for undertaking certain regulatory programs. There was also the option of federal pre-emption if the States chose not to act. In neither case were the States compelled to enact legislation, nor to promulgate

regulations. In fact, the court observed, ". . . this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.*

Such a command is not permissible because the power of the national government operates directly upon the people, not on the States.

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority . . . to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.
>
> * * *
>
> The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce. *Id.*, at 144.

After explaining the principles to be applied in construing the Tenth Amendment, the Court then addressed the arguments of the Government in defense of the "take title" provisions, and against the prohibition on such legislation.

First, the Government argued that this prohibition can be overcome if the federal interest is important enough. The Court responded:

> No matter how powerful the federal interest

> involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents. *Id.*, at 152.

The Government also argued that ". . . the Constitution does, in some circumstances, permit federal directives to state governments." The Court responded that "(v)arious cases are cited for this proposition but none support it." *Id.*

The Brady law compels State officers (Chief Law Enforcement Officers, or "CLEOs") to perform a background investigation of potential handgun purchasers, then either to destroy the records of the investigation if the result is negative, or furnish, if requested, a written explanation if the potential purchaser appears to be ineligible to possess a firearm. Like the "take title" provisions in *New York*, the Brady Law is a direct, and unavoidable command to state officials. Like the "take title" provisions, it violates the Tenth Amendment and exceeds the Commerce Clause powers.

III

THE BACKGROUND CHECK PROVISIONS ARE NOT SEVERABLE FROM THE REMAINING PROVISIONS OF THE ACT.

There is a presumption that the inclusion of an invalid provision, in the same section with a valid provision, indicates that the legislature intended that if the one cannot be given effect, that the other should also fail. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

As is noted in footnote 3, supra, there was an attempt to make the background check, by the CLEO, optional, and the Congress rejected this. Thus, the waiting period and the background check were considered inseparable by the Congress. Further, the waiting period, without the background check, was offered to each successive Congress for many years. In each case, the bill was rejected. The legislature intended that the waiting period accompany, and facilitate, a background check. The two should fail together.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit Court, find the Brady law unconstitutional, and that the background check provisions are not severable from the remaining provisions of the Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAY PRINTZ, Sheriff/Coroner, Ravalli County, Montana,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

RICHARD MACK, Sheriff, Graham County, Arizona,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the interim background check provisions of the Brady Act violate constitutional principles of political accountability.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1478

JAY PRINTZ, Sheriff/Coroner, Ravalli County, Montana,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 95-1503

RICHARD MACK, Sheriff, Graham County, Arizona,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amicus Council of State Governments is a multi-branch organization whose members include all fifty state governments and United States territories. *Amicus* National Conference of State Legislatures is a bipartisan organization representing the legislatures of the fifty States and American territories and commonwealths. *Amici* and their members have a compelling interest in legal issues that affect the role of the States in our federal system. In *amici*'s view, this case is not about gun con-

trol policy. It raises, instead, an important question about "the proper division of authority between the Federal Government and the States." *New York v. United States*, 505 U.S. 144, 149 (1992). *Amici* accordingly submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

1. Under the Gun Control Act of 1968 (GCA), the federal Bureau of Alcohol, Tobacco and Firearms (ATF) licenses and regulates firearms manufacturers, importers, and dealers. 18 U.S.C. §§ 921 *et seq.* The GCA prohibits these federal licensees from selling firearms to persons who are within any one of eight federally determined categories of ineligible purchasers, including persons who have either been convicted of, or are under indictment for, crimes punishable by imprisonment for more than one year; unlawful users of controlled substances; persons who have been adjudicated as mentally defective or committed to any mental institution; and persons subject to judicial restraining orders in domestic disputes. *See* 18 U.S.C. § 922(d).

The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (1993) (Brady Act), amends the GCA to assist federal licensees to avoid selling firearms to ineligible persons. The Brady Act establishes interim provisions for pre-sale background checks of handgun purchasers and permanent provisions for pre-sale background checks of firearms purchasers. *Compare* 18 U.S.C. § 922(s)(1) *with id.* § 922(t)(1). The permanent provisions direct the federal government to establish a national instant criminal background check system by November 30, 1998. *Id.* § 922 Note. After this computerized national system is established, federal firearms licensees, subject to certain exceptions, may not transfer a firearm unless they contact that system and obtain a

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

"unique identification number" for the transfer. *Id.* § 922(t)(1) & (3). The federal computer system may not assign a unique identification number if (1) receipt of the firearm would violate federal law because the purchaser is ineligible under one of the eight federal law categories or (2) receipt would violate state law. *Id.* § 922(t)(2); *see also id.* § 922(g) & (n).

Although regulation of firearms under the permanent provisions of the Brady Act is an exclusively federal program, the interim background check provisions require state or local law enforcement officials to regulate handgun transfers between federal licensees and private purchasers. Under the interim program, which is in effect for up to five years (until the national instant check system is established), federal firearms licensees who intend to transfer a handgun must obtain a statement of the name, address, and date of birth of a prospective purchaser and a statement that the purchaser is not ineligible under the various categories of federal law. *Id.* §§ 922(s)(1)(A)(i)(I), 922(s)(3)(A) & (B). Federal licensees must give notice and a copy of this information to "the chief law enforcement officer" (CLEO) of the transferee's residence. *Id.* § 922(s)(1)(A)(i)(III) & (IV). Federal licensees may not transfer a handgun (1) unless they receive notice from the CLEO that this officer has no information that receipt or possession of the handgun by the transferee would violate federal, state, or local law or (2) until five business days have elapsed after providing notice and they have not received information from the CLEO that the transfer would violate federal, state, or local law. *Id.* § 922(s)(1)(A)(ii).

The Brady Act defines a "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." *Id.* § 922(s)(8). A CLEO may be either a local or a state official. *See* 59 Fed. Reg. 37,532, 37,533-34 (July 22, 1994) (list of CLEOs includes both state and local officials); U.S. General Accounting Office, *Gun Control: Implementation of the Brady Handgun Violence Preven-*

tion Act (GAO/GGD-96-22) (Jan. 1996) (hereinafter GAO Report) at 14 n.8 (state police departments serve as CLEOs in some States).

The Brady Act imposes three duties on these state or local law enforcement officials.[2] First, the CLEO must conduct a background check on prospective handgun purchasers. The CLEO "shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. § 922(s)(2). Second, if the CLEO determines that a handgun transfer does not violate federal, state or local law, then this state or local official "shall * * * destroy" the federal licensee's statement of information about a prospective purchaser and related records. *Id.* § 922(s)(6)(B)(i). Third, if the CLEO determines that an individual is ineligible to receive a handgun, then this state or local official, at the request of such individual, "shall provide" the reason for this determination "in writing within 20 business days after receipt of the request." *Id.* § 922(s)(6)(C).

All three duties imposed on CLEOs by the Brady Act are judicially enforceable. Although the federal government has determined that the criminal penalty provisions of the Brady Act do not apply to CLEOs,[3] *id.* § 924(a)(5), it has also determined that "injunctive relief may be an

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[2] The interim provisions of the Brady Act do not apply in States and territories that screen handgun purchasers through a permit system or other procedures that meet federal standards. *See* 18 U.S.C. § 922(s)(1)(C) & (D).

[3] A CLEO is also immune from liability for damages arising out of performance of these duties. 18 U.S.C. § 922(s)(7). Nonetheless, a person erroneously denied a firearm "may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, * * * for an order directing that the erroneous information be corrected or that the transfer be approved" and for attorney's fees. *Id.* § 925A.

option to compel law enforcement officials to fulfill their responsibilities under the [Brady] act." *Compare* Office of Legal Counsel Memorandum, Mar. 16, 1994 *with* GAO Report at 7; *id.* at 88-90 (App. V—Department of Justice Letter to GAO, Nov. 8, 1995).

2. Shortly after enactment of the Brady Act, the ATF issued an "open letter" to guide CLEOs in its implementation. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Open Letter To State And Local Law Enforcement Officials (Jan. 21, 1994) (reprinted in Br. for U.S., No. 95-1478, App. 1a-23a) (hereinafter U.S. App.). ATF stated that the Brady Act "clearly anticipates some minimal effort to check commonly available records," that "a reasonable effort should be made to determine whether the buyer has a criminal record," and that in States with centralized mental health records CLEOs could search these records if they were accessible. *Id.* at 13a-14a. The agency noted that "it is difficult to prescribe precisely what must be done in every instance" and that CLEOs have broad discretion to determine what constitutes a "reasonable effort" to ascertain whether receipt of a firearm would violate the law. *Id.* at 14a-15a.

The Attorney General subsequently designated the National Crime Information Center (NCIC) as the national recordkeeping system that CLEOs must consult under the interim program. 59 Fed. Reg. 9498 (Feb. 28, 1994). In addition to these federal computer records, the Attorney General had previously noted that CLEOs could make a much more extensive search of "local, county, state, and national records—whether they are in file folders or computerized." *Frank v. United States*, 860 F. Supp. 1030, 1038 (D. Vt. 1994), *aff'd in part and rev'd in part*, 78 F.3d 815 (2d Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3856 (U.S. June 13, 1996) (No. 95-2006) (quoting letter from Attorney General Reno to Rep. Charles Schumer, Nov. 9, 1993).

Petitioner Jay Printz, Sheriff and Coroner of Ravalli County, Montana, stated that a background check might require one hour to several days. Printz Pet. 5. Peti-

tioner Richard Mack, Sheriff of Graham County, Arizona, stated that background checks consumed one to two man-hours of effort per day. Mack Pet. 6. *See also Frank v. United States*, 860 F. Supp. at 1035 (Vermont sheriff testified that "each background check takes a minimum of fifteen minutes and sometimes up to six hours"). Sheriff Printz noted six types of state and local records to be searched under the Brady Act, and he testified that a simple search of the NCIC computer data is not sufficient.[4] Printz Pet. 4-5, 6.

Sheriff Mack and Sheriff Printz both testified that they had limited resources. Mack Pet. 6; Printz Pet. 4. Sheriff Printz testified that he would have to shift some of his manpower and financial resources from enforcement of state law to enforcement of the Brady Act: "If I am now compelled to perform background checks of our residents, it will have to be done by pulling deputies off patrol and investigation duties." Printz Pet. 4; *see id.* at 5-6; *Romero v. United States*, 883 F. Supp. 1076, 1079 (W.D.La. 1994) (stipulation that Louisiana sheriff did not have sufficient funding both to fulfill state law duties and to undertake additional duties mandated by Brady Act).

Sheriff Printz testified further that duties imposed on him as CLEO under the Brady Act are contrary to state law, which provides that:

> No county * * * or other local government unit may prohibit, register, tax, license, or regulate the purchase, sale, or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession * * * of any weapon, including a rifle, shotgun, handgun, or unconcealed handgun.

Printz Pet. 5 (quoting Mont. Code § 45-8-351(1)).

The *Printz* district court expressly found that the impact of the duty to perform background checks was "far

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[4] NCIC data addresses directly only two of the eight federal categories of ineligible purchasers. *Compare* 59 Fed. Reg. 9498 (Feb. 28, 1994) *with* 18 U.S.C. § 922(d).

from *de minimis*": "[t]he ascertainment/background check provision is most burdensome."[5] Pet. App. 60a. For example, the district court found that even the basic determination of "the applicable law on which the ascertainments are made" may be a "substantial undertaking[]" for a CLEO. *Id.* Prospective handgun purchasers who have been "convicted in any court of [] a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 922(d)(1), are ineligible; however, federal law also defines this phrase and excludes "[a]ny conviction * * * for which a person * * * has had civil rights restored * * * unless such * * * restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.* § 921(a)(20). The district court found, with examples, that the determination of the law, federal or state, governing these inquiries "is not always easily made." Printz Pet. App. 60a n.28.

The court of appeals did not question the district courts' findings. Instead, it concluded that the two sheriffs had "not demonstrated that the Act will interfere unduly with their duties," and the Brady Act did not approach the point of "stall[ing] the state government in its tracks by imposing all-consuming federal duties on the State's employees." *Id.* at 15a.

SUMMARY OF ARGUMENT

1. In the Brady Act, Congress imposed a duty on States to serve as "implements of regulation." *See New York v. United States*, 505 U.S. at 161. Congress made the policy decisions: pre-sale background checks of individuals who purchase handguns from private, federally licensed firearms dealers; destruction of the records associated with the background check within ten days if the sale does not violate the federal, state or local law; and a statement of reasons for a determination that a prospec-

[5] This court did conclude, however, that the effect of the duty to destroy statements and records "can be considered *de minimis* in the absence of the other mandates." Printz Pet. App. 61a.

tive purchaser is ineligible to purchase a handgun. 18 U.S.C. §§ 922(s)(2), 922(s)(6)(B)(i), 922(s)(6)(C). Congress, however, did not provide federal personnel or federal funds to enforce these three handgun transfer laws. Instead, Congress imposed all the administrative and financial costs of enforcement on state and local officials.

The Brady Act provides that a state or local "chief law enforcement officer" (CLEO) "shall" enforce these three handgun transfer laws. *Id.* This duty is enforceable by an injunction. *See* GAO Report at 7. CLEOs must allocate their limited administrative and financial resources to enforce federal law even though their constituents may "prefer their government to devote its attention and resources to problems other than those deemed important by Congress." *New York v. United States*, 505 U.S. at 168.

2. Congress does not have the power under our Constitution to impose a duty on the States to serve as its "implements of regulation." When Congress provides the States with a choice of accepting a conditional grant, or "of regulating [private] activity according to federal standards or having state law pre-empted by federal regulation," then "state officials remain accountable to the people." 505 U.S. at 167-68. The Brady Act does not offer the States any choice; it "compels States to regulate" private handgun transfers and diminishes "the accountability of both state and federal officials." *Id.* at 168; *see also id.* at 168-69, 182-83.

The Brady Act impermissibly blurs the political accountability of both Congress and state officials because responsibility for substantive handgun regulation policies is divorced from the duty to provide the money and personnel to enforce these policies. Congress set handgun regulation policies in the Brady Act without having to take into account the costs of enforcement. The States and local governments must provide the personnel and funds necessary to enforce the Brady Act at the expense of implementing state policies and fulfilling the demands

of their citizens. The Brady Act blurs political accountability in a way that threatens democratic self-governance because CLEOs will be held accountable by their constituents for decreased enforcement of state law even though they did not have any choice about allocating resources to enforce the Brady Act.

3. Although Congress could have authorized state and local officials to enforce the Brady Act and relied on their voluntary cooperation, Congress does not have the power to compel CLEOs to serve as "implements of regulation." Statutes enacted by the earliest Congresses provide an important guide to understanding the Framers' constitutional plan. They confirm this Court's determination in *New York v. United States* that the Constitution does not "permit Congress to employ state governments as regulatory agencies." 505 U.S. at 163. Instead of imposing duties on the States, the Framers anticipated voluntary state cooperation in the enforcement of federal law. *See United States v. Jones*, 109 U.S. 513, 519-20 (1883). For example, from 1789 forward Congress has authorized state officials to arrest federal offenders.

With the special exception of Congress' power to enforce constitutional duties of state officers, this Court has consistently held that Congress cannot "compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. at 188. Pressing social problems do not justify departures from fundamental constitutional principles. Congress could reasonably have relied on voluntary enforcement or induced state and local officials to cooperate in enforcement of the Brady Act through means that respect constitutional principles of political accountability.

ARGUMENT

I. THE DUTIES IMPOSED BY THE BRADY ACT ON "CHIEF LAW ENFORCEMENT OFFICERS" TO IMPLEMENT FEDERAL RULES FOR PRIVATE HANDGUN TRANSFERS HAVE TWO SIGNIFICANT EFFECTS ON THE STATES

In recent years this Court has considered three distinct categories of federal statutes that have significant effects on the States.[6] The first is congressional enactments that regulate private activity. *See, e.g., United States v. Lopez*, 115 S.Ct. 1624 (1995). The second is federal statutes that "subject state governments to generally applicable laws"—statutes that regulate the States by subjecting them "to the same legislation applicable to private parties." *New York v. United States*, 505 U.S. at 160 (citing *inter alia Gregory v. Ashcroft*, 501 U.S. 452 (1991); *South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)). Finally, a third category of federal statutes "use[s] the States as implements of regulation."[7] *New York v. United States*, 505 U.S. at 161.

Each of these three categories of federal statutes has significant effects on the States. When Congress regulates an aspect of private activity, it displaces the States' substantive policy choices. *See, e.g., Lopez*, 115 S.Ct. at 1631 n.3. For example, in the Fair Labor Standards Act

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[6] *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 495, 515-36 (1954); D. Bruce La Pierre, *Political Accountability In The National Political Process—The Alternative To Judicial Review Of Federalism Issues*, 80 Nw. U. L. Rev. 577, 636-39 (1985).

[7] In two cases, *FERC v. Mississippi*, 456 U.S. 742 (1982), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), this Court upheld Congress' power under the commerce clause to induce the States to implement federal regulations for private activity. *See New York v. United States*, 505 U.S. at 161-62. In *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court upheld Congress' power to condition federal grants on state regulation of the age for drinking alcoholic beverages.

(FLSA), Congress established minimum wage and maximum hour requirements for employees engaged in activities connected with interstate commerce. *See United States v. Darby*, 312 U.S. 100 (1941). Congress' decision to regulate these aspects of the employer-employee relationship has a significant impact on the States: a single substantive policy for private activity determined in the national political process (wage and hour regulation) preempts the States' policy choices (no regulation or different wage and hour regulations).

Federal statutes that regulate the States by extending federally-determined substantive rules for private activity to analogous state activity have a second, distinct effect: the States' choices about goods and services financed through taxes and provided collectively may be altered. For example, when Congress extended the FLSA minimum wage and maximum hour regulations to most state and local government employees, many States complained that the cost of government would be increased and that they would either have to reduce services and benefits or increase taxes. *See, e.g., National League of Cities v. Usery*, 426 U.S. 833, 846-51 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

In addition to regulation of private activity and the extension of generally applicable regulations to the States, federal statutes occasionally require the affirmative exercise of state authority to implement federal regulation of private activity. *See* note 7 *supra*. If, for example, Congress decided to employ the States as its agents in enforcing the FLSA minimum wage and maximum hour regulations against private employers,[8] it might require state legislatures to enact legislation establishing the federal standards as state law, to create state administrative agencies, and to appropriate funds for enforcement. It might require the state executive to administer and en-

[8] The Wage and Hour Division of the federal Department of Labor administers the FLSA. *See* 29 U.S.C. § 204.

force the FLSA regulations, and it might require state courts to adjudicate controversies arising under the FLSA between employers and employees. Such state enforcement of the federal minimum wage and maximum hour regulations would have a major impact: each State would have to allocate its legislative, executive, judicial, and financial resources to satisfy national political demands at the expense of implementing state policies and fulfilling the demands of the State's citizenry.

A. The Brady Act Requires States And Local Governments To Allocate Executive And Financial Resources To Implement Federal Regulations At The Expense Of Enforcing State And Local Laws

The Brady Act includes provisions that fit in both the first and third categories of federal statutes discussed above. The provisions of the Brady Act that require federal firearms licensees to collect information from prospective purchasers, to provide that information to CLEOs, and to delay sale during the five day waiting period, as well as the provisions requiring purchasers to provide this information, are direct federal regulations of private activity. The provisions of the Brady Act that require CLEOs to check the background of purchasers, to destroy records, and to provide a written statement fall within the third category of federal statutes—those that use the States as "implements of regulation."

The three duties imposed on state and local officials have very significant effects. Although the citizens of Ravalli County, Montana or of Graham County, Arizona may "prefer their government to devote its attention and resources to problems other than those deemed important by Congress," *New York v. United States*, 505 U.S. at 168, both Sheriffs must allocate local administrative and financial resources to enforce federal rules governing the transfer of handguns between private parties.

Even if the extent of this effect on individual CLEOs may vary, the effect itself cannot be denied: reallocation of scarce state and local law enforcement resources from

state and local priorities to federal priorities. Ironically, ATF has acknowledged the substantiality of this effect by stating that its "inspectors spend most of their time on higher priority efforts and have no time for inspections related to Brady Act implementation." GAO Report at 52.

B. The Brady Act Requires Some State And Local Officials To Take Actions In Excess Of Or Contrary To Their State Law Authority

Congress did not provide for enforcement of the Brady Act by federal officers, such as ATF agents. Instead, Congress relies on state and local officials to conduct background checks of handgun purchasers. CLEOs in many States and localities may well have adequate authority under state law to regulate in the manner required by the Brady Act. Apart from the diversion of state and local law enforcement resources to federal priorities, the delegation of federal authority to such state and local officers does not impose any additional burdens on the States. Congress is, in effect, simply preserving their authority to regulate private activity that it could otherwise preempt by vesting enforcement authority in federal officials.

In other jurisdictions, however, CLEOs may not have adequate state law authority to regulate handgun sales or, as in the case of Sheriff Printz, they may be prohibited by state law from regulating private handgun transactions. In these circumstances, the Brady Act has a second significant effect: it supplements the authority of state and local officials and alters the States' decisions about the limits of their officers' authority.[9] As one court

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[9] *See generally* D. Bruce La Pierre, *The Political Safeguards Of Federalism Redux: Intergovernmental Immunity And The States As Agents Of The Nation*, 60 Wash. U. L.Q. 779, 843-45, 942, 1023-1033 (1982) (distinguishing federal statutes that delegate federal authority to enforce federal law from federal statutes that supplement state law and purport to empower state officers, agen-

of appeals has noted, the Brady Act "substantively enlarges the duties and authority given the CLEOs by the States, without the States' consent or participation." *Koog v. United States*, 79 F.3d 452, 459 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3017 (U.S. June 25, 1996) (No. 95-2077); *see id.* at 458-59 & n.7.

The Brady Act requires state and local officials to devote their administrative and financial resources to enforce federal regulations and compels some of these officials to take actions beyond their authority under state law. Congress' decision to use state or local officials as "implements of regulation" raises these constitutional questions: whether Congress is politically accountable for these effects; and whether the Brady Act interferes with the political accountability of state and local officials to their constituents.

II. THE BRADY ACT UNCONSTITUTIONALLY INTERFERES WITH DEMOCRATIC SELF-GOVERNANCE IN THE STATES

In drawing the line between state and federal authority, this Court has recognized that the States' role in our federal system is to provide democratic self-governance. For example, although this Court divided sharply in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), over the question whether the power of judicial review is necessary to protect the States' role in the federal system, the entire Court shared the understanding that democratic self-governance in the States is the fundamental value protected by federalism principles. On the one hand, Justice Blackmun, writing for the majority, rejected the power of judicial review because it was not adequate to the task of protecting democratic self-governance in the States. 469 U.S. at 545-47; *see* La Pierre, 80 Nw. L. Rev. at 623-24. On the other hand,

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cies, or political subdivisions to act solely on basis of the delegated federal authority).

Justice Powell argued in favor of judicial review because he believed that "democratic self-government at the state and local levels" was "far more effective" than at the federal level. 469 U.S. at 576 (Powell, J., dissenting).

In subsequent cases, this Court has emphasized political accountability—of both Congress and the States—as the central means of ensuring that the interests of citizens are adequately represented and of protecting democratic self-governance in the States. *New York v. United States*, 505 U.S. at 168-69, 182-83, 185; *see United States v. Lopez*, 115 S.Ct. at 1638 (Kennedy, J., concurring) (noting the importance of "two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States"); *id.* at 1651-52 (Souter, J., dissenting) (the legitimacy of federal legislation "comes from Congress's political accountability"); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) ("Federalism serves to assign political responsibility, not to obscure it.").

A. Political Accountability Is The Test Of Congress' Power To Use States And Local Governments As "Implements Of Regulation"

In *New York v. United States*, this Court measured Congress' power to use the States as "implements of regulation" by the political accountability of both state and federal officials. 505 U.S. at 167-69, 182-83. Two means of providing for state implementation of federal regulations are valid: conditional grants and "the choice of regulating [private] activity according to federal standards or having state law pre-empted by federal regulation." 505 U.S. at 167. Under each of "these two methods * * * of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply." *Id.* at 168. The State "may elect to decline a federal grant," or it "may choose to have the Federal Government rather than the State bear the expense of a federally mandated

regulatory program." *Id.* When "Congress encourages state regulation rather than compelling it, * * * state officials remain accountable to the people." *Id.*; *see id.* at 185.

A third means of using the States as "implements of regulation" is not valid. Congress cannot "cross[] the line distinguishing encouragement from coercion," *id.* at 175, and "compel the States to enact or administer a federal regulatory program." *Id.* at 188. "[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *Id.* at 168; *see id.* at 168-69, 182-83.

In *New York*, this Court held that Congress cannot require a State either to take title to low level radioactive waste generated by private parties within its borders, or to regulate the disposal of such waste "according to the instructions of Congress." *Id.* at 175. Both of these alternatives are unconstitutional, and "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." *Id.* at 176. With regard to the first alternative, Congress simply has no power "to transfer radioactive waste from generators to state governments." *Id.* at 175. Moreover, in language that speaks directly to the Brady Act, this Court found that "the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to implement legislation enacted by Congress [and] * * * the Constitution does not empower Congress to subject state governments to this type of instruction." *Id.* at 175-76.

B. The Brady Act Blurs Political Accountability Because It Divorces Responsibility For Substantive Policies From The Duty To Enforce

The Brady Act, just like the alternative to taking title to low level radioactive waste, requires the States and local governments to regulate private activity "according

to the instructions of Congress." *See* 505 U.S. at 175. CLEOs must conduct background checks on prospective handgun purchasers, destroy certain information and records, and provide in certain circumstances a written explanation of a determination that an individual is not eligible to purchase a handgun. *See* 18 U.S.C. § 922(s)(2); *id.* § 922(s)(6)(B)(i); *id.* § 922(s)(6)(C).

The Brady Act impermissibly blurs the political accountability of Congress and of the States because responsibility for substantive handgun regulation policies is divorced from the duty to provide the administrative and financial resources required to enforce these policies. Although Congress established the substantive policy that handgun purchasers are subject to background checks, it compelled the States and local governments to provide the enforcement resources. There is no political check because Congress does not have to appropriate any funds or allocate any administrative resources to enforce its policies. If Congress had adopted either one of the two means approved by this Court in *New York v. United States*, and induced CLEOs to enforce the federal background check regulations as a condition of a federal grant or under a threat of federal preemption and enforcement by the ATF, then Congress would bear at least some of the enforcement costs. By shifting these costs entirely to States and local governments, however, Congress escapes political accountability. Indeed, one cannot even be confident that a majority of both houses of Congress would have imposed a background check requirement if the federal government had to spend federal funds or reallocate federal law enforcement personnel to this task.

While Congress escapes political responsibility under Brady, state and local officials are held accountable for decisions made by the federal government. State and local legislatures, as well as CLEOs, are compelled under the Brady Act to allocate their limited administrative and

financial resources to implement federal policies even though their constituents may "prefer their government to devote its attention and resources to problems other than those deemed important by Congress." *New York v. United States*, 505 U.S. at 168. CLEOs must allocate administrative and financial resources to perform the regulatory duties imposed by the Brady Act. If there is no increase in their budgets, these state and local officials will have to decrease enforcement of state and local laws. In these circumstances, state or local legislative bodies will then be forced either (1) to increase the budgets of CLEOs by raising taxes or reallocating resources from other areas of the budget or (2) to acquiesce in the reduction of state and local law enforcement by CLEOs. *See* Printz Pet. App. 54a-55a.

State and local CLEOs will be held accountable by their constituents for decreased enforcement of state and local laws even though they did not have any choice about whether to allocate resources to enforce the Brady Act. State and local legislatures will be held accountable by their constituents for reduced services or increased taxes even though they did not have any choice about whether to provide resources to enforce the Brady Act. Thus, the Brady Act blurs political accountability in a way that threatens democratic self-governance in the States. *See* Deborah J. Merritt, *Three Faces of Federalism: Finding A Formula For The Future*, 47 Vand. L. Rev. 1563, 1580 n. 65 (1994) ("Although the [Brady] Act specifically exempts local officers from civil liability for erroneous determinations, it does not shield them from popular criticism or electoral retaliation for those decisions.") (citation omitted).

If, however, state or local regulation of handgun transfers is a condition of a federal grant or an alternative to federal preemption and ATF enforcement, then both state and local legislatures and CLEOs can choose whether to allocate their resources to enforce federal law. If state

or local citizens "prefer their government to devote its attention and resources to problems other than those deemed important by Congress," *New York v. United States*, 505 U.S. at 168, they can decline a federal grant or leave enforcement of background checks to the ATF. If the Brady Act offered the States these choices, "state governments [would] remain responsive to the local electorate's preferences; state officials [would] remain accountable to the people." *Id.*

The court of appeals did not apply this Court's political accountability test. Instead, it claimed that "*New York* was concerned with a federal intrusion of a different kind and much greater magnitude than any involved in the Brady Act." Printz Pet. App. 10a. With regard to the "kind" of federal intrusion, the court of appeals read *New York* as confined to protecting only the States' legislative or policymaking processes. *Id.* at 12a-13a & n.7. It then concluded that "CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations" and that, "[i]nstead, they are directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program." *Id.* at 14a.

There is no warrant for this purported distinction between policymaking and policy enforcement. Even if the *New York* Court was primarily concerned about the effect of federal mandates on state legislatures, it does not follow that there should be no concern about the effects of the Brady Act's mandates on state and local executive branch officials. The question is not whether this Court's disapproval of federal mandates in *New York* was confined to interference with state legislatures, but instead whether the effects of the Brady Act on the States also raise fundamental problems of political accountability.

Apart from a brief mention that the States "must bear political accountability" for a state policy, *id.* at 12a, the court of appeals did not address the issue of political

accountability. *But see Koog v. United States*, 79 F.3d at 460-61 (discussing problems of political accountability raised by the Brady Act). It did not offer any explanation for its tacit assumption that the States' policymaking, but not their allocation of resources, is the only aspect of democratic self-governance protected by the Constitution. Moreover, the court of appeals' assumption that some aspects of democratic self-governance are more important, more "central" than others, is unworkable and unwarranted. There is no reason why, for example, legislative policymaking is any more "central" to democratic self-governance than a CLEO's decision about allocation of limited law enforcement resources between federal background checks of gun purchasers and state background checks of individuals seeking employment in child care facilities.

In any event, the court of appeals' attempt to distinguish *New York* on the ground that the statute therein imposed a duty on state legislative processes fails on its own terms. The argument begins with the concession that under *New York* Congress could not compel States to enact laws requiring CLEOs to conduct background checks and assumes "that Congress is somehow on *better* constitutional footing if it by-passes the state legislature" completely and "directly compels state and local officials" to enforce federal regulations. *Frank v. United States*, 860 F. Supp. at 1042-43. Under this line of reasoning, Congress could make an end-run around *New York*. Congress would never have to encourage or compel state legislatures to enact legislation: Congress could simply by-pass the middleman and require state and local executive officials to enforce federal regulations. *Id.* at 1043.

The court of appeals also erred in reading a balancing test into *New York*. It held that the Brady Act imposes "minimal interferences with state functions" and that it does not "stall the state government in its tracks by imposing all-consuming federal duties on the State's employees." Printz Pet. App. 13a-14a. This judicial second-

guessing about the sheriffs' burdens in meeting their Brady Act duties and the implicit balancing of federal and state interests are inconsistent with this Court's express rejection of a balancing test. *See New York v. United States*, 505 U.S. at 178 ("Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.").

III. THE FRAMERS INTENDED THAT VOLUNTARY COOPERATION BETWEEN THE STATES AND THE FEDERAL GOVERNMENT WOULD BE AN INTEGRAL PART OF OUR FEDERAL SYSTEM

A. The Duties Imposed By Congress On CLEOs To Enforce Federal Law Are Inconsistent With The Lessons Of History

In *New York v. United States*, this Court reviewed the history of the Articles of Confederation and the adoption of the Constitution and concluded that the Constitution does not "permit Congress to employ state governments as regulatory agencies." [10] *See* 505 U.S. at 163; *see also*

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[10] One commentator argues that the Court misread this history. *See* Saikrishna B. Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957 (1993). Although the Framers intended to prohibit Congress from issuing commands to state legislatures, they did not intend to prohibit Congress from using "state executives and courts [as] the 'bureaucratic puppets' and 'field offices' of the federal government." *Id.* at 2037. These arguments, however, do not take into account the statutes enacted by Congress after adoption of the Constitution, which, as discussed below, confirm the *New York* Court's reading of constitutional history.

Another commentator argues that this Court's conclusion in *New York* is inconsistent with an earlier decision, *Testa v. Katt*, 330 U.S. 386 (1947). *See* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1060 (1995). This Court nonetheless correctly rejected the argument that the Supremacy Clause gives Congress power to compel state executive officials to enforce federal regulations. *New York v. United States*, 505 U.S. at 178-79; *see* La Pierre, 60 Wash. U. L.Q. at 944-45.

id. at 163-66. The Court found that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 166. Although the Framers intended that the federal government would be able to act directly through its own officers and that it would not have to rely on the States to execute federal law, they also anticipated voluntary state cooperation.[11] *See United States v. Jones*, 109 U.S. 513, 519-20 (1883).

Beginning with the first administration of President Washington, Congress has relied on state assistance to implement federal law. *See* Leonard D. White, *The Federalists: A Study In Administrative History* 387-405 (1948) (discussing state cooperation in the administration of federal law in the early years of the republic). In providing for state enforcement of federal law, Congress authorized state officials to act, but, with only a few exceptions, it did not impose any duty on them to enforce federal laws. In reviewing these statutes, the courts almost invariably maintained that the delegation of federal authority could not expand the state law authority of the delegate and that state officials must have adequate au-

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[11] For example, THE FEDERALIST recognizes that Congress can "make use of the State officers and State regulations, for collecting" federal taxes. THE FEDERALIST, No. 36 at 227 (A. Hamilton) (J. Cooke ed. 1961); *see also id.* at 226 (in assessing and collecting taxes, "[t]he national Legislature can make use of the *system of each State within that State*" (emphasis in original); *id.*, No. 45 at 313 (J. Madison) ("[i]ndeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be cloathed with the correspondent authority of the Union); *id.*, No. 27 at 174 (A. Hamilton) (the Constitution "will enable the government to employ the ordinary magistracy of each [State] in the execution of its laws").

These statements about use of state officers fall far short of any assertion that Congress could impose a duty on state officers to enforce federal law. Hamilton's and Madison's statements are most easily understood, consistent with the actual practices of early Congresses, as a recognition that the federal government could rely on States' voluntary cooperation to enforce federal law.

thority under state law to exercise the delegated federal authority. *See* La Pierre, 60 Wash. U. L.Q. at 1039-46.

For the most part, early statutes delegated federal authority to state judicial officers to perform quasi-judicial functions and a few functions that are more clearly executive.[12] Beginning with the Judiciary Act of 1789, Congress authorized state justices of the peace and magistrates, at the expense of the United States, to arrest, imprison, and admit to bail offenders of the criminal laws of the United States.[13] Congress also authorized depositions *de bene esse* to be taken by state court judges and mayors.[14] Although the courts never considered the validity of the latter delegation, they consistently upheld Congress' power to delegate authority to arrest, imprison, and bail federal law offenders.[15] Congress subsequently delegated similar authority to state judicial officers to arrest deserting seamen [16] and fishermen,[17] to grant bail to persons arrested for violating federal laws regulating trade with the In-

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[12] Congress' practice of delegating federal authority primarily to state judicial officers to perform quasi-judicial functions is explained in part by the Madisonian Compromise and the understanding that state courts would exercise jurisdiction over cases within the Article III judicial power.

[13] Act of September 24, 1789, ch. 20, § 33, 1 Stat. 91-92.

[14] Act of September 24, 1789, ch. 20, § 30, 1 Stat. 88-90.

[15] *Ex parte Gist*, 26 Ala. 156 (1855); *Harris v. Superior Court*, 196 P. 895 (Cal. App. 1921); *Goulis v. Stone*, 140 N.E. 294 (Mass. 1923); *Commonwealth v. Holloway*, 5 Binn. 512 (Pa. 1813); *Ex parte Rhodes*, 12 Niles' Weekly Register 264 (S.C. 1817). *Contra Maryland v. Rutter (Almeida's Case)*, 12 Niles' Weekly Register 115, 231 (Baltimore County Court 1817); *Ex parte Pool*, 4 Va. Cas.) 276, 284-91 (1821) (Semple, J., dissenting) (dictum).

[16] Act of July 20, 1790, ch. 29, §§ 3 & 7, 1 Stat. 132-34. *See Robertson v. Baldwin*, 165 U.S. 275 (1897) (upholding Congress' power to authorize state justices of the peace to arrest deserting seamen); *Ex parte Pool*, 4 Va. (2 Va. Cas.) 276 (1821) (same).

[17] Act of June 19, 1813, ch. 2, § 1, 3 Stat. 2.

dians,[18] to issue search warrants,[19] to take depositions in claims against the United States,[20] and to take testimony in cases of disputed congressional elections for submission to the clerk of the House of Representatives.[21]

In addition to these statutes delegating authority to perform quasi-judicial functions, other statutes delegated authority to state judicial officers to perform functions that seem to be more executive or administrative in nature, such as the naturalization of aliens.[22] All the courts that considered the question of Congress' power to delegate authority to state courts to naturalize aliens upheld this power, but the opinions usually noted that the state courts

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[18] Act of March 30, 1802, ch. 13, § 16, 2 Stat. 144-45.

[19] Act of March 2, 1799, ch. 22, § 68, 1 Stat. 677-78.

[20] *See United States v. Bailey*, 34 U.S. (9 Pet.) 238, 254 (1835) (collecting statutes).

[21] Act of January 23, 1798, ch. 8, §§ 5-6, 1 Stat. 538.

[22] Congress authorized state and federal courts to admit aliens to citizenship and provided that the clerks of these courts "shall record" citizenship applications. *See* Act of April 14, 1802, ch. 28, § 1, 2 Stat. 153-54; Act of January 29, 1795, ch. 20, §§ 1-2, 1 Stat. 414-15; Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103-04 (1790). A few provisions of these early naturalization statutes specifically imposed a "duty" on the clerks of these courts, but Congress paid the clerks to perform these duties. *See* Act of April 14, 1802, ch. 28, § 2, 2 Stat. 154-55; Act of June 18, 1798, ch. 54, §§ 2-4, 1 Stat. 567-68.

In addition to naturalization, two other statutes are examples of delegation of federal authority to state judicial officers to perform administrative functions. Congress authorized state court judges to take proof of the circumstances that would entitle refugees from Canada and Nova Scotia to a bounty paid by the Department of War. Act of April 7, 1798, ch. 26, § 3, 1 Stat. 548. Congress also authorized judges of "a county court of the State of Oklahoma" to supervise land conveyances by Indians, and the Oklahoma Supreme Court approved this delegation of power where the state legislature had authorized the county courts to act in the capacity provided by federal law. *Marcy v. Board of Comm'rs*, 144 P. 611 (Okla. 1914).

had authority under state law to perform this function for the federal government and frequently added that Congress could not compel performance of this task.[23]

Most of these early statutes simply delegated authority to state judicial officers, and only two statutes imposed a duty on these officers to perform either quasi-judicial or executive functions.[24] In our nation's early years, Congress frequently turned to state judicial officials to assist in the enforcement of federal law, but it made only one provision for assistance by state executive officers. In section one of the Fugitives from Justice and Fugitive Slave Act of 1793, Congress imposed a duty on the executive authority of each State to arrest and deliver fugitives from other States.[25] Although there are a few other federal statutes and regulations imposing duties on state executive officials, Congress, for the most part, has looked to voluntary state cooperation. *See* La Pierre, 60 Wash.

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[23] *See, e.g., Holmgren v. United States*, 217 U.S. 509 (1910); *Levin v. United States*, 128 F. 826 (8th Cir. 1904); *State v. Penney*, 10 Ark. 621 (1850); *In re Conner*, 39 Cal. 98 (1870).

[24] In 1790, Congress required justices of the peace to determine the fitness of a ship bound on a voyage to a foreign port upon a complaint that the vessel was not seaworthy. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132-33. In 1793, Congress required federal judges and state magistrates to grant a warrant for the removal of recaptured fugitive slaves. Fugitives from Justice and Fugitive Slave Act of 1793 (Act of February 12, 1793), ch. 7, § 3, 1 Stat. 302-05. In *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), several members of this Court commented extensively on the question of Congress' power to impose this duty on state magistrates, but they decided the case on much narrower grounds.

[25] Act of February 12, 1793, ch. 7, § 1, 1 Stat. 302. Notwithstanding the constitutional provision requiring extradition of fugitives from justice, U.S. Const. art. IV, § 2, cl. 2, this Court held in 1861 that Congress "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107 (1861), *overruled by Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (recognizing Congress' power to enforce "the dut[ies] . . . directly imposed upon the States by the Constitution itself").

U. L.Q. at 1023-33, 1046; *but see* Caminker, 95 Colum. L. Rev. at 1044-45 (reading a sample of early statutes more broadly).

In short, our early history demonstrates that Congress relied on voluntary state cooperation to enforce federal law, and it provides only scant support for a putative power to impose a duty on either state judicial or state executive officials to enforce federal law. The statutes enacted by the earliest Congresses provide an important guide to understanding the Framers' constitutional plan, *see, e.g., Myers v. United States*, 272 U.S. 52, 175 (1926), and they confirm this Court's determination in *New York* that the Constitution does not "permit Congress to employ state governments as regulatory agencies." 505 U.S. at 163. The past has been prologue to the present—modern statutes imposing duties on state officials to regulate private activity are rare. *See* La Pierre, 60 Wash. U. L.Q. at 1033-34; *see also* Caminker, 95 Colum. L. Rev. at 1002-03 & n.3.

B. Congress Has Constitutionally Valid Means To Provide For Background Checks

There is no need to extrapolate any power to compel state and local officials to enforce federal regulatory programs. If federal regulations, like the Brady Act, are sufficiently important, Congress can establish an entirely federal program, like the permanent provisions of the Brady Act. During the interim period before establishment of the national instant criminal background check system, Congress could easily have charged the ATF with the responsibility of making background checks.[26]

Moreover, as this Court recognized in *New York v. United States*, Congress has "a variety of methods, short of outright coercion," to provide for state enforcement of federal regulations like the Brady Act. *See* 505 U.S. at

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[26] Of course, the ATF would have needed additional resources to implement the Brady Act. *See* GAO Report at 52.

166. Congress could have assumed some of the costs of its regulatory program by authorizing and appropriating funds for grants to States and local governments that agreed to enforce federal handgun regulations by making background checks.[27] CLEOs would then have been able to enforce federal law without compromising their responsibility to enforce state law. Instead of imposing a duty on States to enforce the Brady Act, Congress could also have preempted state regulation of handgun transfers in States that do not have state laws meeting federal standards.[28] Under this approach, Congress and the ATF would have borne the enforcement costs in States that chose not to enforce the federal regulations. Finally, Congress could simply have delegated federal authority to enforce the Brady Act and relied on the voluntary cooperation of state and local CLEOs to conduct background checks of handgun purchasers.

C. Congress Could Reasonably Rely On Voluntary Enforcement Of The Brady Act

Provisions authorizing state enforcement of federal law are legion. Since the inception of the republic, Congress has authorized state officials to arrest federal offenders. *Compare* Act of September 24, 1789, ch. 20, § 33, 1 Stat. 91-92 *with* 18 U.S.C. § 3041. Voluntary enforcement of federal law by state officers is now commonplace. *See, e.g., United States v. Bowdach*, 561 F.2d 1160, 1167-68 (5th Cir. 1977) (execution of federal arrest warrant by state police officer). Instead of imposing duties on

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[27] Although Congress did not appropriate any funds to CLEOs to cover the costs of background checks, the Brady Act authorizes $200 million in funds to States to create or improve computerized criminal record systems or their access to the national instant criminal background system. 18 U.S.C. § 922 Note. Congress has appropriated $100 million of these funds. Pub. L. No. 103-317, 108 Stat. 1724, 1777 (1994).

[28] Twenty-six States have laws meeting federal standards. *See* GAO Report at 4, 18, App. II.

state officials, the federal government has looked to voluntary state cooperation to enforce federal law.[29] In delegating authority to state officials, the federal government has honored state law limits on the authority of state officials to enforce federal regulations.[30] Delegation of authority to the States to enforce federal law and voluntary cooperation by state and local officials is now so pervasive that it is little noted and rarely challenged. *See* La Pierre, 60 Wash. U. L.Q. at 797-98, 1023-28.

Confidence that Congress could rely on the voluntary cooperation of most CLEOs to make background checks is not misplaced. Most state and local law enforcement officials favor background checks for handgun purchasers. *See* GAO Report at 48 n.45 (listing ten police associations and organizations that have filed briefs *amici curiae* in the courts of appeals in support of the Brady Act). When local CLEOs have declined to enforce the Brady Act, state agencies have filled the void. *See id.* at 51. Thus, Congress simply could have delegated authority to make federal background checks to state and local officials and relied on their voluntary cooperation. As the ATF has noted, "the

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[29] For example, during World War I Congress authorized the President to use the services of any state officer in raising military forces and required these officers to perform any duty directed by the President. Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80-81. The President, however, did not exercise any power to give orders to state officers. Instead, the Governors agreed to cooperate, and the President's orders were in fact issued by the Governors. J. P. Clark Carey, *The Rise of a New Federalism* 90-92 (1938); Note, *The President, the Senate, the Constitution, and the Executive Order of May 8, 1926*, 21 Ill. L. Rev. 142, 144 (1926).

[30] President Coolidge issued an executive order authorizing the appointment of state and local officials as prohibition officers of the federal Department of the Treasury to enforce the National Prohibition Act "except in those states having constitutional or statutory provision against state officers holding office under the federal government." Exec. Order No. 4439, May 2, 1926, *quoted in* Note, *supra* note 29, at 143; *see* James Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement*, 13 Va. L. Rev. 86, 99-107 (1926).

CLEO of the buyer's residence has a vested interest in conducting an appropriate check" because that official "is the one who is most likely to have to deal with the consequences of the buyer obtaining a handgun." ATF, Open Letter, U.S. App. 15a.

Unfortunately, Congress did not choose any of these constitutionally valid means of providing for state and local enforcement of federal handgun regulations. Instead, the Brady Act violates the constitutional principles of political accountability that are at the foundation of our federal system. Handgun crimes and the shortage of sites for the disposal of radioactive waste are, without question, both "pressing national problem[s], but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *New York v. United States*, 505 U.S. at 187-88.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

SHERIFF JAY PRINTZ
&
SHERIFF RICHARD MACK

Petitioners,

v.

UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI TO THE
U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Congress exceeds its enumerated powers when it prescribes federal duties for state officials and orders state officials to enforce federal regulations.

2. Whether the Statute, by attempting to abrogate the sovereign immunity of the states, violates the Eleventh Amendment.

3. Whether the unconstitutional portions of 18 U.S.C. §922(s) are severable.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Both petitioners and respondent have graciously consented to the filing of this brief, which supports the position of the petitioners.

The National Rifle Association of America, chartered in 1871, is a nonprofit, nonpartisan, nationwide organization of over 3 million members and over 10,000 affiliated clubs.

The NRA is not only the oldest sportsmen's organization in America, but also is an educational, recreational, and public service organization dedicated to the right of the individual citizen to own and use firearms for lawful recreation and defense.

The NRA is a New York not-for-profit corporation with its principle place of business in Fairfax County, Virginia, and it is supported by membership dues and contributions from public-spirited members and clubs. It is not affiliated with any arms or ammunition manufacturer nor with any business which deals in firearms or ammunition. It receives no appropriations from Congress.

The National Rifle Association has previously filed numerous *amicus curiae* briefs in both state and federal courts. Because this case involves the sale or transfer of firearms, the resolution of this case will effect NRA members, who include sheriffs. Issues in this case include the 10th Amendment and severability. The Court will be assisted by the expertise that the National Rifle Association has developed in this field, and thus, by the filing of *amicus'* brief.

STATEMENT OF THE CASE

Federal law prohibits the transfer of firearms to, or possession by, certain classes of persons, including, *inter alia*, persons convicted of or indicted for certain offenses, illegal aliens, users of illicit drugs, fugitives from justice, persons who have been the subject of certain mental adjudications, persons dishonorably discharged from the armed forces, persons who have renounced their American citizenship, and persons subject to certain domestic restraining orders. 18 U.S.C. §922(d), (g), & (n).

In 1993 Congress enacted Public Law Pub. L. 103-159, 107 Stat. 1536 (1993) ("Statute"). The Statute envisions an eventual permanent system whereby each handgun purchaser would be checked against an automated federal database of prohibited persons. Since no such federal database existed, the statute created an "interim system" under which all duties would be placed upon state officials for five years, or until the federal system is funded and functional.

18 U.S.C. §922(s) requires that each federally licensed firearms dealer ("Federal Firearms Dealer") is required to send a federal form ("Federal Form"), giving notice of each handgun sale, delivery or transfer to a designated state official, the "Chief Law Enforcement Official" ("CLEO"), a statutory term which includes state, and excludes federal, law enforcement officials. 18 U.S.C. §922(s)(1)(A)(i)(III) and (s)(8).

The CLEO is required to: review all such Federal Forms received from Federal Firearms Dealers; determine, after consulting federal databases, if any such purchase violates any federal, state or local law; and to report the results to the Federal Firearms Dealers. The CLEO shall "ascertain within 5 business days whether receipt or possession would be in

violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. §922(s)(2). The Attorney General of the United States has designated two federal databases as the "national system" which the CLEO must check. Order No.1853-94, at 59 *Federal Register* 9498 (Feb. 28, 1994).

The CLEO must make all "reasonable" attempts at these determinations. The federal government's advice to CLEOs provides that the CLEOs' duties go beyond a simple scan for criminal convictions:

> [A] reasonable effort should be made to determine whether the buyer has a criminal record that would make the sale unlawful. Criminal record systems can reveal that the buyer is a fugitive, is under indictment, or has been convicted of a felony. The criminal record systems may also indicate that the buyer is possibly an unlawful user of controlled substances or has had mental health problems. In some States, centralized mental health records may also be available.

Brief for the United States on Petition for Certiorari, *Printz v. United States*, at 14a.

If the CLEO finds that the proposed sale, delivery or transfer, would not violate federal, state or local law, the Statute commands him to destroy the Federal Form and any references to it within twenty (20) business days. 18 U.S.C. §922(s)(6)(B). If the CLEO finds that the proposed purchaser is ineligible to receive a handgun, he must so inform the Federal Firearms Dealer and, if the purchaser requests, provide a written justification of his findings. 18 U.S.C. §922(s)(6)(C). The Statute creates a federal cause of action against the CLEOs'

"State or political subdivision" by the denied purchaser for correction and recovery of attorneys' fees. 18 U.S.C. §925A.

The Statute shifts the primary burden of enforcing the federal Statute onto the state official, requiring the state official to review the Federal Form and to consult federal records designated by a federal official to determine whether each proposed sale by a federally-licensed Federal Firearms Dealer would meet federal statutory standards.

OPINION BELOW

The opinion of the United States Court of Appeals is reported as *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995). The opinions of the United States District Court are reported as *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994), and *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994). This Court granted the petition for certiorari on June 17, 1996.

Petitioners commenced actions in the United States District Court, District of Arizona and the United States District Court, District of Montana seeking declaratory and injunctive relief, challenging the Statute on the grounds that it exceeded Congress' Article I powers and violated the Tenth Amendment. The District Courts held that the Statute's mandate exceeded Commerce Clause powers and violated the Tenth Amendment. *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994). The district courts relied upon this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), in declaring unconstitutional those parts of 18 U.S.C. §922(s) which purport to impose duties upon state officials.

A 2-1 majority of the Ninth Circuit, in *Mack v. United*

States, and *Printz v. United States*, 66 F.3d 1025 (9th Cir. 1995), held that the duties which the Statute compels CLEO's to perform did not violate the Tenth Amendment nor exceed the enumerated powers of Congress.

The subject matter of this case has created a split in the Circuits on a question which involves the delegated powers of Congress, under Article I, section 8, cl. 3 of the Constitution, and the reserved powers of the States, under the Tenth Amendment to the Constitution.

In May 1993, Sheriff Samuel Frank, Sheriff of Orange County, Vermont, commenced an action in the United States District Court, District of Vermont seeking declaratory and injunctive relief, challenging the Statute on the grounds that it exceeded Congress' Article I powers and violated the Tenth Amendment. The District Court, relying upon this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), held that those sections of the Statute which impose ministerial duties upon the CLEO are unconstitutional. *Frank v. United States*, 860 F. Supp. 1030 (D. Vermont 1994). The Second Circuit Court of Appeals reversed in part and affirmed in part, holding that the duties imposed by the Statute do not exceed the delegated powers of Congress, or violate the Tenth Amendment. *Frank v. United States*, 78 F.3d 815 (2nd Cir. 1996).

In a decision issued six (6) days after the decision in the *Frank* case, the Fifth Circuit, in *Koog v. United States*, and *McGee v. United States*, 79 F.3d 452 (5th Cir. 1996), held that the ministerial duties imposed upon the CLEOs, including the duty to perform a background check, the destruction of records, and the duty to furnish written justification for denials, violated the Constitution.

The decision of the Ninth Circuit in the instant case, and the decision of the Second Circuit in *Frank*, are not congruent with the decision of this Court in *New York v. United States*, 505 U.S. 144 (1992), and said decisions are in direct conflict with the decision of the Fifth Circuit in *Koog* and *McGee*.

The Fifth Circuit correctly applied the most recent and directly applicable case law enunciated by this Court in *New York v. United States*, while the Second and Ninth Circuits evaded the holding of this Court in *New York*.

SUMMARY OF ARGUMENT

In enacting the Statute, Congress shifts the primary burden of enforcing this federal Statute onto state officials, commandeering them to review Federal Forms submitted by a federally licensed Federal Firearms Dealer regarding a federally regulated transaction, and to consult and cross check federal records and federal databases designated by a federal official to determine whether each proposed sale, delivery or transfer by a Federal Firearms Dealer would meet federal statutory standards; all of this in regard to a transaction in which the CLEO would otherwise not be involved.

This federal mandate exceeds the authority granted to Congress to "regulate commerce . . . among the several States." U.S. Const., Art. I, §8, cl. 3. Sheriffs Mack and Printz are not Federal Firearms Dealers, nor do they otherwise engage in or affect interstate commerce in firearms. It is the federal Congress which seeks to force such state officials to affect and become a party to interstate commerce in firearms. The ruling of the Ninth Circuit Court of Appeals treats as dispositive the mere fact that others in the CLEO's county engage in such commerce. Under this extraordinary reading, the Commerce Clause extends to inaction, and, therefore, effectively extends

the Commerce Clause to any and all things.

The Statute's mandate to state officials to undertake ministerial duties violates the Tenth Amendment as defined by this Court in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992). The Ninth Circuit Court of Appeals suggests that *New York* be read only to bar Congressional coercion of state policy making, as opposed to the conscription of state officials to administer and enforce federal regulations. The Ninth Circuit Court of Appeals' holding violates the very holding of *New York*, in which this Court held that "[t]he Federal Government may not compel the States to enact *or* administer a federal regulatory program." *New York v. United States*, 505 U.S. at 188, 112 S.Ct. at 2435 (emphasis added).

If the Ninth Circuit's holding is upheld, then the federal government will be given a green light to commandeer the states to perform federal tasks for free, and the states will eventually be robbed of their funds, their resources and their independence; a pattern that will ultimately result in the destruction of federalism.

The Statute, by creating a civil cause of action against the CLEO's "State or political subdivision," constitutes an attempt by Congress to abrogate the states' sovereign immunity in violation of the Eleventh Amendment.

Congress has consistently refused to enact legislation providing for registration of firearms and their owners. Under the interim system, Federal Firearms Dealers are required to send a form giving notice and statement of each proposed handgun sale, delivery or transfer to their CLEO. 18 U.S.C. § 922(s)(1)(A)(iii) & (iv). This is a duty imposed on the Federal Firearms Dealer, who is not a party to this case. The receipt and retention of such records by a CLEO would be inconsistent

with the mandate of 18 U.S.C. § 926(a), which forbids "any system of registration of firearms, firearms owners, or firearms transactions or dispositions...." Hence, merely severing the constitutionally flawed provisions of 18 U.S.C. § 922(s) that impose a duty on the CLEO, including the task of destroying records to prevent registration, would defeat Congressional intent because it would create a registration system. Federal Firearms Dealers would continue to send records to local law enforcement and local law enforcement would no longer be required to conduct background investigations and then destroy the records. They would just retain the records. To avoid defeating Congress's intent of nonregistration, all of §922(s) should be declared nonseverable and voided.

ARGUMENT

I. THE STATUTE EXCEEDS CONGRESS' ENUMERATED POWERS AND VIOLATES THE TENTH AMENDMENT.

"The Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991). The Constitution "[b]eing an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, Commentaries on the Constitution of the United States 752 (1833). "It is in this sense that the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" *New York v. United States*, 112 S.Ct. at 2418, quoting *United States v. Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 85 L.Ed. 609, 132 ALR 1430 (1941).

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are

to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" *United States v. Lopez*, 514 U.S. ___, 115 S.Ct. 1624, 1626 ,131 L.Ed.2d 626 (1995), quoting *Gregory v Ashcroft*, 501 U.S. at 458, 111 S.Ct. at 2400 (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

Among the express powers granted by the Constitution to Congress is the authority "to regulate commerce . . . among the several States." U.S. Const., Art. I, §8, cl. 3. While this power is near-plenary in regard to matters that substantially affect interstate commerce, with "no limitations other than those prescribed in the constitution," *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824), its scope is restricted to regulation of "commercial intercourse," and that "among the several states." *Id.* at 189-90.

In *Lopez*, this Court identified the "three broad categories of activity that Congress may regulate under its commerce power:" the channels of interstate commerce, protection of instrumentalities of interstate commerce, and acts which substantially affect interstate commerce. *United States v. Lopez*, 115 S.Ct. at 1629-30. If a state engages in or affects interstate commerce, it is subject to regulation; to the extent that a state restricts commerce, its act is subject to pre-emption. *See Fry v. United States*, 421 U.S. 542, 548 (1975) (engaging in commerce through employment); *EEOC v. Wyoming*, 460 U.S. 226 (1983) (same).

However, in the instant case Congress has not chosen to preempt state regulation, nor has Congress chosen to regulate the channels or instrumentalities of interstate commerce or the act which substantially affects interstate commerce. Congress has instead chosen to regulate the states themselves. Congress has in effect issued commands to state officials, not on the basis that the CLEOs have engaged in or impeded interstate commerce, but on the basis that they have failed to become so engaged.

While firearms may flow in interstate commerce, the CLEOs, who are impressed into federal service by the federal Statute, are not Federal Firearms Dealers, but are state officials exercising state police powers assigned to them by the state. The state CLEOs are not a part of nor even remotely involved in the firearms transaction that Congress wishes to regulate. Except to the extent that the Statute forces them to be involved, the CLEOs would have no role in the regulated activity at all. This inaction is "in no sense an economic activity." *United States v. Lopez*, 115 S.Ct. at 1634. The CLEOs do not engage in nor interfere with interstate commerce when they refuse to review the Federal Forms and supervise Federal Firearms Dealers. This refusal to affect commerce is not even an "activity." *Id.* at 1663 (Breyer, J. dissenting).

This Court has held that when weighing whether an act of Congress is passed pursuant to the Commerce Power, the regulated activity must not merely "affect" interstate commerce, but must "substantially affect" interstate commerce. "We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *United States v. Lopez*, 115 S.Ct. at 1630.

The CLEO's "inaction" in regard to the regulated

transaction certainly can not be held to "substantially affect" interstate commerce; in fact, it does not affect the regulated interstate activity at all, and said inaction is, therefore, beyond the scope of federal regulation pursuant to the Commerce Power.

In the instant case, the Ninth Circuit brushed aside the Commerce Clause issue by simply noting that firearms move in interstate commerce and that the Statute focuses on the sale rather than simple possession. According to this logic, the fact that private citizens in a state engage in commerce gives Congress the power to commandeer state officials. This is directly contrary to the holding in *New York*. Despite the fact that nuclear waste travels in and affects commerce, this Court held that Congress could not commandeer states to take it.

The fact that a given subject or transaction may in general come under the interstate commerce power does not mean that Congress may order the states to administer or enforce the federal law regarding the subject. "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate State governments' regulation of interstate commerce." *New York v. United States*, 112 S.Ct. at 2408.

Thus, while Congress may use the interstate commerce power to regulate the sale of firearms by Federal Firearms Dealers, Congress does not have the power to commandeer state officials to administer such federal regulations. This is especially true when the attempted "exercise of national power intrudes upon an area of traditional state concern," such as duties to be assigned to local law enforcement. *United States v. Lopez*, 115 S.Ct. at 1638 (Kennedy, J., concurring).

"We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York v. United States*, 112 S.Ct. at 2423. *See also*, *FERC v. Mississippi*, 456 U.S. 742, 762-766, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288-289, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Lane County v. Oregon*, 7 Wall, at 76, 19 L.Ed. 101 (1869).

Congress may use a variety of means to induce states to assist in regulatory programs. "This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices." *New York v. United States*, 112 S.Ct. at 2423. For example, under the spending power Congress may attach conditions to the receipt of federal funds, and Congress may offer States the choice of regulating in accordance with Congressional wishes, or having state regulation preempted by federal regulation. *New York v. United States*, 112 S.Ct. at 24-23-2424.

In *Hodel*, and in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) (FERC), incentives were offered to states for undertaking certain regulatory programs. If the States chose not to do so, the federal government would preempt. In neither case were the states compelled to enact legislation, nor to promulgate regulations. "This Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *FERC v. Mississippi*, 456 U.S. at 761-762, 102 S.Ct. at 2139.

Such a command is not permissible because the power

of the national government operates directly upon the people, not on the states.

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority . . . to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

New York v. United States, 112 S.Ct. at 2423.

In the instant case, the Ninth Circuit concluded that *New York* does not bar federal mandates to State officials to enforce, as opposed to enact, federal programs:

> The Brady Act is not the kind of a federal mandate condemned by *New York* ... [T]he CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. ... Instead, they are directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program.

Mack v. United States, 66 F.3d at 1031.

In dissent, Judge Fernandez argued that the enforce/enact distinction was inconsistent with the teaching of *New York*. In fact, the dissent argued, the latter would be the greater infringement of federalism:

> Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program. . . . If the Tenth Amendment has anything to do with the separate sovereign dignity of the states, it is difficult to see how that dignity is not undermined by the reality of a command that they commit their resources to the carrying out of this kind of federal policy, whether they like it or not.

Id., at 1035 (Fernandez, J., dissenting).

The Ninth Circuit's reading of *New York*, that New York prohibits only federal coercion of state policy making, as opposed to federal conscription of state officials to enforce federal regulations, violates the holding of *New York* that "[t]he Federal Government may not compel the States to enact *or* administer a federal regulatory program." *New York v. United States*, 505 U.S. at 188, 112 S.Ct. at 2435 (emphasis added).

In reaching its decision in *New York*, this Court distinguished those Tenth Amendment cases in which the issue was the authority of Congress to subject state governments to generally applicable laws. These cases include *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528

(1985)(Fair Labor Standards Act); *Fry v. U.S.*, 421 U.S. 542 (1975)(wage stabilization), and *South Carolina v. Baker*, 485 U.S. 505 (1988) (tax exemption on the interest on municipal bonds). *New York v. United States*, 112 S.Ct., at 2420. The Court found these cases inapplicable since the legislation at issue, in *New York*, was not applicable to private parties. "This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. . . . This case instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.*

As noted above, *New York* held that *Garcia* applies only when Congress has subjected a state to the same legislation applicable to private parties; i.e., when Congress imposes a rule of general applicability which also applies to the states. The Statute is clearly not such a law. The duties imposed upon the CLEO are not imposed upon the general public; said duties apply exclusively to state officers. *New York v. United States*, 112 S.Ct., at 2420.

The Second Circuit relied on *Garcia* to produce the opinion that this Court reversed in *New York*. *New York v. United States*, 942 F.2d 114, 119 (2d Cir.1991). Despite this Court's holding in *New York* about *Garcia*'s import, the Second Circuit again relied on *Garcia* to uphold the Statute's mandate that CLEOs perform background checks. *Frank v. United States*, 78 F.3d 815 (2nd Cir. 1996). The Second Circuit has wrongly applied *Garcia* again.

In New York, the Government unsuccessfully argued that any Tenth Amendment prohibitions can be overcome if the federal interest is important enough. *Id.*, at 2429. The Court

responded:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents. *Id.*

The Government also argued that ". . . the Constitution does, in some circumstances, permit federal directives to state governments." *Id.* The Court flatly rejected this assertion. "Various cases are cited for this proposition but none support it." *Id.*

When the federal government attempted in 1975 to force state agencies to enforce federal standards under the Clean Air Act, the Fourth, Ninth and District of Columbia Circuits held that such an attempt would exceed the Commerce Clause and violate the Tenth Amendment. *See State of Maryland v. EPA*, 530 F.2d 215, 227-28 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 837-39 (9th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975) ("We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing nonconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist."). *But see Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974).

After this Court granted certiorari in said cases, the U.S. Solicitor General declined to defend the challenged regulations,

see Brief for the Federal Parties, *EPA v. Brown* (No. 75-909) at 20 n.14. This Court then remanded for consideration of mootness. *EPA v. Brown*, 431 U.S. 99 (1977). On remand, the Ninth Circuit held portions of the Tenth Amendment challenge still justiciable and struck the regulation. The federal government left the ruling unchallenged. *Brown v. EPA*, 566 F.2d 665 (9th Cir. 1977).

What the federal government viewed as an indefensible position in 1977, the federal government now asserts. This is the more surprising in light of this Court's recent holding that:

> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did not intend that Congress should exercise that power through the mechanism of mandating State regulation. The Constitution established Congress as a 'superintending authority over the reciprocal trade' among the States, The Federalist No. 42, p. 268 (C. Rossiter, ed. 1961) by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to State governments.

New York v. United States, 505 U.S. at 166, 112 S.Ct. at 2430-2431.

The Statute compels state officials to perform investigations of potential purchasers in a federally regulated transaction and to review Federal Forms received from a Federal Firearms Dealer, and then to either to destroy said Federal Forms, or to furnish, if requested, a written explanation if the potential purchaser appears to be ineligible to possess a firearm. Like the "take title" provisions in *New York*, the

Statute is a direct command to state officials to perform federal services under a federal regulatory program. Like the "take title" provisions struck down in *New York*, the Statute's commands to state officials violate the Tenth Amendment and exceed the Commerce Clause powers.

The Ninth Circuit decision is directly contrary to this Court's holdings, and attempts to extends the Commerce Clause to the point where it abrogates federalism altogether. If the federal government can use its Commerce Clause powers to force state officials to supervise commerce to Congressional specification, then states are no more than unpaid regional offices of the national government. But that may not be, because, as this Court has held, "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government." *New York v. United States*, 505 U.S. at 188, 112 S.Ct. at 2434.

Even the United States has previously admitted this. In briefing *New York* before this Court, the United States tried to defend the subject federal statute from a Tenth Amendment challenge by stating that such statute did "not constitute the kind of impermissible commandeering about which the Court expressed concern in *Hodel* and *FERC*" and that such statute was "qualitatively different from the implementation of federal policies regulating private activity, which would transform state administrative bodies into 'field offices of the national bureaucracy.'" Brief of the United States, *New York v. United States*, at 36-37, *quoting FERC v. Mississippi*, 456 U.S. at 777.

By the Ninth Circuit's logic,

> ... there is no state governmental function which Congress cannot reach and control. . . . The states can

> be forced to act or not to act, as Congress chooses to define the burden. They have no refuge but obedience, since if they act--or fail to act--with greater or less vigor than Congress deems useful, they transgress its power and offend the Constitution. The traditional remedy of unwilling states, abandonment of the field to direct federal control, is barred.

David Salmon, *The Federalist Principle: Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 Col. J. Environ. L. 290, 326-27 (1976).

The Ninth and Second Circuit's holdings violate the Constitution and are contrary to this Court's holding in *New York*. "Whatever the outer limits of . . . sovereignty may be, one thing is clear: the federal government may not compel the states to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. at 188, 112 S.Ct. at 2435.

II. THE STATUTE IS DESTRUCTIVE OF FEDERALISM.

If the Ninth Circuit's holding is upheld, the result will be the inevitable destruction of federalism.

When Congress was considering the Statute, it rejected an amendment which would have forced the Federal Bureau of Investigation to conduct the background checks. H.R. Rep. No. 103-344, 103rd Cong., 1st Sess., at 7 (1993). Instead, the federal Congress chose to burden state officials with conducting such federally mandated duties. The Statute is an attempt by Congress to appropriate state funds and resources to pay for programs which Congress thought wise to enact and for which Congress will claim credit, but which the states will bear the burden of enforcing and funding. This diminishes the ability of

states to perform other governmental functions. If this Court allows Congress to so appropriate state resources, then it is certain that more such appropriations will take place. As the federal government is allowed to commandeer the states to perform federal tasks for free, the states will eventually be robbed of their funds, their resources and their independence.

> If Congress is allowed gratuitously to order the states to perform federal tasks, it will not have to pay for what it gets. As ideas for federal projects grow but resources lessen, the incentives will grow stronger for Congress to command the state government to perform federal programs for free.

Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 Geo. Wash. L. Rev. 907, 928 (1989). *See also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 15 (1988)("Congress has recently forced State and local governments to administer national programs at State expense. This technique permits Congress to escape fiscal accountability for its actions."); Ronald Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. Pa. L. Rev. 289, 312-13 (1984)("If the federal government is willing to assume the full burdens of direct regulation it will not impose regulations without carefully considering the costs involved.")

Such federal appropriations of state resources pose additional dangers to the very concept of federalism.

> [I]f the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than

> the wishes of local citizens. These results are antithetical to the popular control exerted in a republican form of government.

Deborah Merritt, *The Guarantee Clause and State Autonomy: Federalism For A Third Century*, 88 Col. L. Rev. 1, 61 (1988).

In *New York*, this Court predicted that such federal "commandeering" would undermine the very core of federalism, permitting the federal government to shift accountability to the states.

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

New York v. United States, 505 U.S. at 169, 112 S.Ct. at 2424. *See also* Merritt, 88 Colum L Rev, at 61-62; La Pierre, *Political Accountability in the National Political Process--The Alternative to Judicial Review of Federalism Issues*, 80 N.W.U.L. Rev 577, 639-665 (1985).

III. THE STATUTE VIOLATES THE ELEVENTH AMENDMENT.

The Eleventh Amendment to the United States

Constitution provides that "[the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." U.S. Const., Amend. XI.

"Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 134 L.Ed.2d 252, 1996 U.S. LEXIS 2165 (1996), quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779,111 S.Ct. 2578, 115 L. Ed. 2d 686 (1991). This Court reaffirmed, in the very recent case of *Seminole Tribe of Florida*, that the Eleventh Amendment stands for the two part presupposition that "each State is a sovereign entity in our federal system;" and, secondly, that it is inherent in the nature of a state's sovereignty not to be amenable to suit without the state's consent. *Seminole Tribe of Florida v. Florida*, 1996 U.S. LEXIS at 2181. See also *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L. Ed. 842 (1890), and The Federalist No. 87, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). "For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe of Florida v. Florida*, 1996 U.S. LEXIS at 2181, quoting *Hans v. Louisiana*, 134 U.S. at 15.

In *Seminole Tribe of Florida*, this Court specifically overruled a contrary precedent which was from approximately the same time as *Garcia*. *Seminole Tribe of Florida v. Florida*, 1996 U.S. LEXIS at 2168, over-ruling *Pennsylvania v. Union Gas* Co, 491 U.S. 1 (1989).

"We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity , the Indian Commerce Clause does not grant Congress that power, and therefore [the statute at issue] cannot grant jurisdiction over a State that does not consent to be sued." *Seminole Tribe of Florida v. Florida*, 1996 U.S. LEXIS at 2166-2167. This is so despite the fact that "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Id.*, 1996 U.S. LEXIS at 2194.

The Statute, by creating a civil cause of action against the CLEO's "state or political subdivision" for an erroneous denial, constitutes an attempt by Congress to abrogate the states' sovereign immunity in violation of the Eleventh Amendment. 18 U.S.C. § 925A.

IV. THE UNCONSTITUTIONAL PORTIONS OF 18 U.S.C. §922(S) CANNOT BE SEVERED FROM THE VALID PORTIONS.

18 U.S.C. §922(s)'s imposition of duties violates the Tenth Amendment and exceeds Commerce Clause powers. The question remains whether §922(s) falls, or only some severable portion of it. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 691 (1987), teaches that legislative history should be reviewed to determine whether a constitutionally flawed provision in a statute is severable or nonseverable. Severing only the constitutionally flawed portions of the statute would leave a statute that creates a registration system at the level of chief law enforcement official. Congress's refusal to enact firearm and firearm owner registration requires a finding that § 922(s) is nonseverable.

A. National Firearms Act

Congress enacted a firearm registration statute only once. The 1934 National Firearms Act covered a narrow field of firearms: e.g., machine guns, short barrelled shotguns, and short barrelled rifles. 26 U.S.C. § 5841, 5845. Ordinary rifles, shotguns, pistols, and revolvers were not included in the registration requirement. H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1-2 (1934). See also David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumberland L. Rev. 585, 593 (1987). All efforts at registration have subsequently been defeated.

B. Property Requisition Act

In 1941, shortly before Pearl Harbor, Congress enacted the Property Requisition Act. 55 Stat. 742 (1941). It specifically provided that nothing in the act would be construed "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport ... [or]... to impair or infringe in any manner the right of any individual to keep and bear arms ...."[1] The prohibition against registration and protection of the right to bear arms were inserted because of the unhappy experiences with Hitler and Stalin. 87 Cong. Rec. 6778 (1941)(Rep. Edwin Arthur Hall). It was felt that granting extraordinary powers to the Executive did not warrant an infringement of personal rights and liberties expressed in the Constitution. H.R. Rep. No. 1120, 77th Cong., 1st Sess. 2 (1941).

C. 1968 Gun Control Act

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[1] For recent expositions on the right to bear arms see Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162 (Harvard Univ. Press 1994); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L. J. 1236 (1994); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193 (1992).

Registration proposals were defeated in what became Title I of the 1968 Gun Control Act. P. L. 90-618. Rep. McClory introduced an amendment to register handguns. 114 Cong. Rec. 22248 (1968). Rep. Bingham offered an amendment to Rep. McClory's amendment so that registration would also apply to rifles and shotguns. 114 Cong. Rec. 22255. Rep. McClory's amendment to register handguns was defeated 168 to 89. 114 Cong. Rec. 22267. Rep. Bingham's amendment was defeated 172 to 68. 114 Cong. Rec. 22266.

Rep. McClory then offered an amendment requiring licensing. 114 Cong. Rec. 22745. It was defeated by a vote of 179 to 84. 114 Cong. Rec. 22763.

Arguments in the House against registration and licensing included claims that a federal dossier would be created on every citizen. 114 Cong. Rec. 22268 (Rep. Griffin). Licensing was opposed as another modified form of registration. 114 Cong. Rec. 22748 (Rep. Sikes).

Rep. Latta reminded the House that registration and licensing were rejected. 114 Cong. Rec. 30580.

In the Senate, Sen. Tydings offered an amendment requiring registration and licensing. 114 Cong. Rec. 27149-27150. Sen. Tydings' amendment was defeated. 114 Cong. Rec. 27421. Sen. Tydings then offered an amendment providing for handgun licenses. 114 Cong. Rec. 27457-27458. It was defeated. 114 Cong. Rec. 27460.

Sen. Jackson proposed an indirect approach to registration by denying federal firearm licenses to gun dealers in states that do not require registration and transmittal to NCIC. 114 Cong. Rec. 27422. This was defeated. 114 Cong. Rec. 27427.

Sen. Brooke proposed an amendment that would have provided for direct registration at the local and federal level.

Re-registration would be required whenever a gun owner would change his residence. 114 Cong. Rec. 27428-27429. The amendment was rejected. 114 Cong. Rec. 27456.

Sen. Hruska reminded the Senate that registration and licensing issues were met four square and rejected. 114 Cong. Rec. 30184.

D. The Firearms Owners' Protection Act

The Firearms Owners' Protection Act, P.L. 99-308, 100 Stat. 449 (1986), provided that 18 U.S.C. § 926(a) specifically not require the registration of firearms and their owners: "No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Secretary's authority to inquire into the disposition of any firearm in the course of a criminal investigation."

E. Public Law 103-159, 107 Stat. 1536

The Statute under consideration also contains a proscription against registration. The chief law enforcement officer is required to destroy the Federal Form and any references to it within 20 business days if the proposed transfer would not violate federal, state, or local law. 18 U.S.C. § 922(s)(6)(B)(i).

Congress never envisioned that it was creating a registration system at the local law enforcement level. 18 U.S.C. §922(s) cannot be severed; it stands or falls as a whole.

The Statute was enacted with Congressional intent not

to impose registration. For example, Rep. Roukema explained that "the Brady bill in no way provides for a system of national gun registration--quite the opposite. In every instance where a handgun sale is approved under Brady, law enforcement officers must destroy the information they've been provided within 20 days." 139 Cong. Rec. H9106 (Nov. 10, 1993). Rep. Hushes agreed: "To help protect the privacy of legal purchasers, it [the bill] requires that a copy of the statement and other records of the transaction be destroyed within 20 days." *Id.* at H9117.

The Statute also requires the reporting of multiple handgun sales to State and local police and the destruction of those records within 20 days. 18 U.S.C. § 923(g)(3). This destruction requirement, Senator Dole explained, "eliminates the concern that this would be back door gun registration." 139 Cong. Rec. S16311 (Nov. 19, 1993).

Congress without a doubt intended not to enact any kind of registration scheme. The Statute, minus the unconstitutional parts, is contrary to Congressional intent, and thus the whole Statute must be voided.

CONCLUSION

18 U.S.C. §922(s) exceeds the Commerce Clause powers delegated by the people to Congress, and violates principles of federalism guaranteed in the Tenth Amendment. Because excising the unconstitutional provisions creates a statute that Congress never intended, 18 U.S.C. § 922(s) is not severable. Amicus curiae respectfully submits that the Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit and hold 18 U.S.C. §922(s) invalid.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1996

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

SHERIFF RICHARD MACK,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON WRITS OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

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INTERESTS OF AMICI

Amici curiae States have a direct interest in the protection of their sovereignty under our federal system. A core power of the States is their ability to respond to the wishes of their populace, expressed in a republican form of government, and to establish the laws that will govern the conduct of their own officials. At issue in this case is whether Congress has unconstitutionally attempted to make the States mere administrative subdivisions of the federal government contrary to the sovereign powers reserved to them by the Tenth Amendment. As detailed below, the Brady Act imposes significant demonstrable burdens on the States -- conscripting state resources and officials, while blurring political accountability.

Amici States have a variety of firearms laws which have been enacted by their respective legislatures. While amici have very diverse views on the merits of laws such as the Brady Act, they are not here to argue over the wisdom of such laws. The amici States appear before the Court to ask that it recognize a simple tenant of federalism: Congress cannot conscript state officials to enforce its regulatory schemes without violating the Tenth Amendment.

SUMMARY OF ARGUMENT

This case represents a simple, straight-forward application of *New York v. United States*. Congress has commandeered state and local law enforcement officials to administer its federal program regulating handgun sales, and, in so doing, has violated the Tenth Amendment.

There is no "de minimis" exception to the Tenth Amendment. Even if there were, the burdens the mandate provisions of the Brady Act impose on state government and

state sovereignty are far too significant to pass constitutional muster.

The mandate provisions of the Brady Act violate the Guaranty Clause. The Act seriously interferes with the States' ability to manage their own law enforcement officials, and it improperly makes state and local officials accountable for policy decisions made by Congress.

Garcia has shown itself to be unworkable as exemplified by the litigation over the Brady Act. It should, accordingly, be overruled.

ARGUMENT

I. THE BRADY ACT COMMANDEERS STATE AND LOCAL OFFICIALS CONTRARY TO *NEW YORK V. UNITED STATES*.

This is a simple case. In *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408 (1992), the Court stated that Congress may not "'commandeer' state governments into the service of federal regulatory purposes." 112 S. Ct. at 2428. Such commandeering would "be inconsistent with the Constitution's division of authority between federal and State governments." *Id.* This simple, bright-line rule is based on the indisputable constitutional fact that "[s]tate governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. . . . Whatever the outer limits of [state] sovereignty may be, one thing is clear: the Federal government may not compel the states to enact *or administer*

a federal regulatory program." *New York v. United States*, 112 S. Ct. at 2434-35 (emphasis added).

The mandate provisions of the Brady Act[1] are at least an equally extreme intrusion into state sovereignty as the scheme invalidated in *New York v. United States*. The States are required to expend substantial state resources to implement the federal regulations Congress imposed on them. Moreover, Congress has directly conscripted state and local law officials to do its bidding.[2]

In the decision below, the Ninth Circuit invented a rule that while the federal government may not order States to promulgate laws or regulations, the federal government may help itself to state employees, and order them to serve federal ends. The Ninth Circuit reasoned that commandeering at least a portion of the executive branch of state government is acceptable, while conscripting legislative functions is not. This "standard" gives far too little weight to state sovereignty. The legislative branch is not the only state function protected from commandeering by Congress. The Constitution also protects the other functions from federal conscription. *See Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (Tenth Amendment and Guaranty Clause protect State's right to "determine the qualifications of their most important government officials," in that case, judicial

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[1] 18 U.S.C. §§ 922(s)(2), 922(s)(6)(B), 922(s)(6)(C). The Amici States take no position as to the other provisions of the Brady Act, nor do they address the issue of severability raised by the parties.

[2] The court in *New York v. United States* recognized that Congress may have alternative means available to it to accomplish its objectives not involving commandeering state and local officials. 112 S. Ct. at 2423-24. Those alternatives, however, are not now before the Court.

officials). *See also FERC v. Mississippi*, 456 U.S. 742, 777 (1982) (O'Connor, J., dissenting) ("[s]tate . . . administrative bodies are not field offices of the national bureaucracy").

Congress cannot make state and local officials "law enforcement functionaries in carrying out a federal program" as the Ninth Circuit suggested below. The Ninth Circuit's attempt to put the plain language of *New York v. United States* "in context" is also unavailing. "The federal government may not compel the states to enact *or administer* a federal regulatory program." *New York v. United States*, 112 S. Ct. at 2475 (emphasis added).

The bright-line, no-commandeering test in *New York v. United States* avoids the problem created by *National League of Cities v. Usery*, 426 U.S. 833, 845-46 (1976), in determining what constitutes a "traditional" government function. It also is consistent with history dealing with the proper role of the States under the Constitution. *New York v. United States*, 112 S. Ct. at 2418-19. Assessed against this proper test, the commandeering facets of the Brady Act must fail.

II. THE TENTH AMENDMENT CONTAINS NO "DE MINIMIS" EXCEPTION. EVEN IF IT DID, THE BRADY ACT PLACES A SIGNIFICANT BURDEN ON STATE AND LOCAL LAW ENFORCEMENT AND STATE SOVEREIGNTY.

A. THERE IS NO "DE MINIMIS" EXCEPTION TO THE TENTH AMENDMENT.

Proponents of the mandate provisions of the Brady Act sometimes attempt to justify them as a "de minimis" intru-

sion on state sovereignty. A "de minimis" exception, however, is inconsistent with the bright-line rule, discussed above, adopted by the Court in *New York v. United States*. *See also New York v. United States*, 112 S. Ct. at 2429 (rejecting "balancing test" urged by the United States; "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.").

This Court, moreover, has recognized the insidiousness of such "incrementalism" as embodied in the purported "de minimis" exception to the Tenth Amendment. Constitutional freedoms are rarely destroyed all at once. "Of course no one expects Congress to obliterate the States, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions -- in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." J. Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean* 57 Geo. Wash. L. Rev. 907, 912 (1989) (quoting L. Tribe, American Constitutional Law 381 (1988)).

Even accepting Respondents' assertions that all of the Brady Act's intrusions into state sovereignty are minimal, they are still illegitimate. "Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.'" *Miranda v. Arizona*, 384 U.S. 436, 459 (1966) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)). Nor is there any constitutional significance to the federal government's claims about the laudable objectives behind the intrusions the mandate provisions of the Brady Act make into state sovereignty. "Experience

should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by*, *Katz v. United States*, 389 U.S. 347, 353 (1967). *See also New York v. United States*, 112 S. Ct. at 2429 (rejecting "balancing test," discussed above).

The Ninth Circuit adopted a "de minimis" standard that Congress may not impose so many "all consuming" burdens that the States are stalled "in their tracks." This "test" is wholly subjective and totally unworkable. Is a state "stalled in its tracks" if its judicial branch is totally conscripted by Congress, so long as its legislative and executive branches are free to function? State sovereignty should not hinge on such a subjective and standardless determination by a federal court.[3] There is no "de minimis" exception to the Tenth

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[3] The Ninth Circuit's purported "de minimus" standard is analogous to a First Amendment "de minimis" exception in which newspapers could be ordered to print congressionally-written content, so long as there was still some room in the newspaper remaining for the paper's owners to print content of their own choosing. However: "Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply," mandated content is a *per se* interference with a newspaper's editorial discretion. "[T]he exercise of editorial control and judgment," free of government mandates, is a part of the protected core of the First Amendment. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Similarly, the exercise of control and judgement by policy-making officials in the fundamental, traditional state function of law enforcement is part of the protected core of the

(continued...)

Amendment, and this case, in any event, is certainly not within any de minimis category.

B. THE BRADY ACT IMPOSES A SIGNIFICANT BURDEN ON STATE SOVEREIGNTY.

Sheriffs Mack and Printz, in their briefs, detail the large burden personally imposed on them by the mandate provisions of the Brady Act, and how the Act interferes with the performance of their duties. Those provisions of the Brady Act also impose significant burdens on state law enforcement nationwide.

In calendar year 1995, there were 26 states that were not exempt from the Brady Act.[4] In 1995, there were 1,614,736 "code F" requests[5] made on the Federal Bureau

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[3](...continued)
Tenth Amendment, and such indicia of sovereignty should be afforded equal constitutional protection as that afforded individuals under the First.

[4] Alabama, Alaska, Arizona, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Maine, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Washington, West Virginia and Wyoming. North Carolina became an exempt State on December 1, 1995, but is included for the entire year for purposes of calculating the averages discussed below. This information was obtained from the Office of Liason and Public Information, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms.

[5] "Code F" requests include Brady Act checks, other (continued...)

of Investigation's Interstate Identification Index as accessed through the National Criminal Investigation Center ("NCIC") for the 26 non-exempt states.[6] This equates to 62,105 "code F" checks per State per year. Assuming that half of the "code F" checks are Brady Act checks,[7] each State was forced to make 31,052 Brady Act checks in 1995, and all of the non-exempt States were forced to make 807,368 Brady Act checks in that year.

Referring to the evidence presented by Sheriff Frank in *Frank v. United States*, 78 F.3d 815 (2d Cir. 1996), a Brady Act check can take anywhere from 15 minutes to six hours. 78 F.3d at 830. Assuming, conservatively, that the average background check took only one hour,[8] state and local law

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[5](...continued)
firearms checks, and checks made for such things as concealed-carry permit requests. Colorado, in 1995, had 71,806 "code F" requests according the Federal Bureau of Investigation. According to the Colorado Bureau of Investigation, 52,894 of those checks related to applications under Colorado's Instant Background Check System. It is, therefore, a reasonable assumption that at least half of the "code F" requests made by the non-exempt States related to Brady Act checks.

[6] This data was obtained from the Federal Bureau of Investigation's Criminal Justice Information Services Division. The monthly data for 1995 was compiled for the 26 non-exempt States.

[7] *See supra* note 5.

[8] The testimony of Sheriffs Frank and Printz support this assumption – a very conservative one considering that the Brady Act requires:

(continued...)

enforcement officials spent 807,368 hours in 1995 alone performing Brady Act checks. For the 26 non-exempt States, that is approximately 31,052 hours per State in 1995.

Brady Act checks consist of more than simply checking the NCIC. The sheriff or police chief must conduct an investigation "including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. § 922(s)(2). The mandatory research into the national system "and" into "whatever state and local recordkeeping systems are available" is conjunctive. Under the plain statutory language, researching the national system is necessary but not sufficient.[9] The NCIC contains records of felony arrests (and

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[8](...continued)

(a) a background check, 18 U.S.C. § 922(s)(2), where the information on the federal form is often incomplete or the information obtained from a check prompts further inquiry;
(b) destruction of records if the search uncovers no negative information, *id.*, § 922(s)(6)(B); and
(c) the provision of an explanation if approval for a sale is denied, *id.*, § 922(s)(6)(c).

Colorado's experience for 1995 showed a denial rate of approximately 6 percent (3,069 out of 52,894). Assuming that state and local law enforcement officials are forced to explain their decisions only 6 percent of the time, undoubtedly such explanation and dealing with disgruntled would-be purchasers, including potential litigation with them, will significantly impact the average time spent on each background check.

[9] Statements from the United States Department of Justice about how much effort is required by state and local law enforcement officials under the Brady Act do not, of course, (continued...)

sometimes, but often not, felony convictions), fugitive warrants, and indictments. There are six other federal disqualifying categories,[10] none of which are contained in the NCIC database, most of which are not contained in any consolidated database.

The overwhelming mass of man hours necessary to implement the mandate provisions of the Brady Act are to be supplied by state employees. Federal employees have a much more minor role. They may prosecute private citizens who violate the Act (there have been fewer than a dozen prosecutions so far); they provide limited assistance to the sheriff or police chief by operating the NCIC and the FBI's Interstate Identification Index; and they may prosecute, or threaten to prosecute, state employees who refuse to implement the federal regulatory scheme.

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[9](...continued)
change the actual language of the statute, nor do they provide any assurance the Department of Justice policy will continue once this litigation is resolved. Moreover, nothing the Department of Justice can say can change the civil liability that is created by the Brady Act, 18 U.S.C. § 925A, and the enormous pressure such liability creates on local government. That section expressly provides a civil remedy to persons denied a firearm as a result of the mandatory background check, including a potential award to those persons of attorneys fees. Potential liability for attorneys fees is especially threatening to state and local officials who are forced to operate under very tight budget restraints.

[10] 18 U.S.C. § 922(d) (users of or addicts to controlled substances; certain persons with mental illness; illegal aliens; persons dishonorably discharged from the armed forces; persons who have renounced citizenship; and persons who are the subject of certain court orders related to domestic violence).

Enforcement of this federal mandate is the most coercive sort possible: state officers who fail to comply with this federal command are subject to criminal penalties. 18 U.S.C. § 924(a)(5). That section provides that "*whoever*" violates the background check portions of the statute -- which expressly reference state and local law enforcement officials -- "shall be fined not more than $1,000, imprisoned for not more than one year, or both." That the Department of Justice may choose not to initiate criminal prosecutions in the instant cases is no guarantee that it will so refrain in the future. Such assurances are certainly hollow with respect to the new laws that will inevitably be enacted if the conscription component of the Brady Act is allowed to stand, laws that will impose more criminal penalties on more state employees who fail to carry out Congress' bidding at state expense.

Many States have exempted themselves from the Brady Act by enacting other forms of background checks. Such checks can include a licensing system for handgun owners, or an immediate computer background check, performed by a central state criminal records agency. *See, e.g.*,. Colo. Rev. Stat. §§ 12-26.5-101 - 109 (Colorado Instant Criminal Background Check System).[11]

However, the fact that some States have enacted exempting legislation to mitigate the more coercive effects of the Brady Act does not negate the existence of a Tenth Amendment violation. As explained in *FERC v. Mississippi*, 456 U.S. 742, 761 (1982), the lawmaking power is the essence of state sovereignty. If the States must enact particular legislation in order to reclaim the full right to control the duties of their sheriffs and chiefs of police, then Congress

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[11] The State of Colorado budgeted $434,000 in fiscal year 1995-96 to administer its Instant Background Check System.

has mandated a second violation of the Tenth Amendment as a "protection" against the first violation. *See New York v. United States*, 112 S. Ct. at 2428 (allowing States to choose from two alternatives, both of which violate the Tenth Amendment, does not cure Tenth Amendment violation). *See also id.* at 2431-32 (States cannot consent to Tenth Amendment violation).

The mandate provisions of the Brady Act do not limit themselves to commandeering low-level, line employees, such as clerks in a motor vehicle licensing bureau. Rather, the Act conscripts sheriffs and chiefs of police, who are expected to exercise substantial discretion in performing important policy-making decisions. When a state appointee is "in a position requiring the exercise of discretion concerning issues of public importance," this Court has been especially careful to police the boundaries of federal intrusion under the Commerce Clause. *See Gregory v. Ashcroft*, 501 U.S. 452, 464, 467 (1991) (applying "plain statement" rule so as to construe federal Age Discrimination in Employment Act not to apply to state judges). Even more so than police chiefs, sheriffs are charged by the People of the States with exercising policy-making discretion, for the sheriffs are generally elected directly by the People.

As for the lower-ranking officers and deputies who are indirectly conscripted by the Brady Act, "Police officers in the ranks do not formulate policy, per se, but they are clothed with authority to exercise an almost infinite variety of discretionary powers." *Foley v. Connelie*, 435 U.S. 291, 297 (1978). Thus, "[p]olice officers very clearly fall within the category of 'important nonelective . . . officers who participate directly in the . . . *execution* . . . of broad public policy.'" *Id.* at 300 (emphasis in original; quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). As a whole, "The police function fulfills a most fundamental obligation of

government to its constituency." *Id.* Thus, congressional attempts to control state and local law enforcement officers must be scrutinized even more carefully and skeptically than efforts to control ordinary state employees.[12]

A statute in which Congress takes all the credit, while the States are forced -- under threat of criminal prosecution of its employees -- to perform literally millions of hours of unfunded work could hardly be characterized as "de minimis."[13] The mandate provisions of the Brady Act are *sui generis* in their blatant conscription of state and local officials to implement a federal program. To uphold the mandate provisions of the Brady Act will inevitably encourage Congress to push the envelope further.

The mandate provisions of the Brady Act impose a significant burden on state resources and state sovereignty and represents a clear violation of the Tenth Amendment.

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[12] *Accord Younger v. Harris*, 401 U.S. 37, 44 (1971) (recognizing importance to "Our Federalism" of non-interference with state judicial functions).

[13] One could at least argue that federal requirements that States report facts which are already known to them, such as known cases of missing children, and known traffic fatalities, are de minimis. The burden of reporting known facts is far less than the burden of ascertaining facts which are not known to the State. Of course, federal requirements that state officers perform federal work are not really de minimis, especially when they are coercively enforced through criminal or civil sanctions.

III. THE COMMANDEERING OF STATE AND LOCAL OFFICIALS VIOLATES THE GUARANTY CLAUSE.

The Guaranty Clause, U.S. Const. art. IV, § 4, guarantees to the States a republican form of government. *See New York v. United States*, 112 S. Ct. at 2432-33. The "distinguishing feature" of a republican form of government "is the right of the people to . . . pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to the those of the people themselves." *Baker v. Carr*, 369 U.S. 186, 222 n.48 (1962) (*quoting In re Duncan*, 139 U.S. 449, 461 (1891)).

The mandate provisions of the Brady Act violate the Guaranty Clause. First, State control over state government expenditures is protected by the Guaranty Clause. *See Brown v. EPA*, 521 F.2d 827, 840 (9th Cir. 1975), *vacated and remanded for consideration of mootness*, 431 U.S. 99 (1977).[14] The ability of state citizens to manage their local law enforcement through republican means is derogated if local law enforcement must spend its time carrying out federal directives, rather than programs democratically chosen by the local electorate.

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[14] When the case was before the Supreme Court, the Solicitor General effectively admitted that EPA's regulations, which forced the states to enforce particular pollution laws, were illegal. Brief for Federal Parties at 20 n.14, *EPA v. Brown*, 431 U.S. 99 (1977) (Nos. 75-909, 75-960, 75-1050, 75-1055) (Secretary "concedes the necessity of removing from the regulations all requirements that the States submit legally adopted regulations; the regulations contain no requirement that the State adopt laws.").

Second, the Guaranty Clause also ensures that the States be accountable only for their own acts. Essential to a republican form of government is that "state government officials remain accountable to the local electorate." *New York v. United States*, 112 S. Ct. at 2433. *See also* D. Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L. Rev. 815 825 (1994) ("The body that reaps electoral credit for an initiative should also bear the risk of any political fall-out; otherwise the representatives do not have the appropriate incentives for weighing the costs and benefits of a program.") The mandate provisions of the Brady Act destroy such accountability by requiring state and local law officials to administer and "take the heat" for Congress' regulatory program.

The Ninth Circuit belittled these Guaranty Clause principles by claiming that the Brady Act represents a "minimal interference with state functions" and by hypothesizing that since the Brady Act received a great deal of national publicity, the public will know that the federal government is responsible, and assign all relevant blame accordingly. The "de minimis" point has been already discussed. The point that the "public will know who to blame" is not only irrelevant, it is belied by the facts. In a poll conducted when the Brady Act was enacted, 27% of respondents knew nothing about the Brady Act; 30% could only identify it as a "gun control" bill.[15] In any event, it is unlikely that a disgruntled individual who is denied the opportunity to purchase a handgun will take out his frustrations on Congress rather than the Sheriff who effectively blocked his purchase.

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[15] Luntz Weber Research and Strategic Services, *A National Survey on Crime, Violence, and Guns* June 1993.

IV. THE COURT SHOULD OVERRULE *GARCIA*.

The Second and Ninth Circuits found *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) persuasive authority to uphold the constitutionality of the Brady Act, despite its obvious defects.[16] There are also those who believe *Garcia* sets the appropriate standard for assessing even those legislative acts that are directed at the States in contrast to laws of general applicability. *Cf. New York v. United States*, 112 S. Ct. at 2420 *with id.* at 2443-44 (White, J., concurring in part and dissenting in part) (describing how the "more appropriate analysis should flow from *Garcia*"). In order to provide lower courts with clear direction as to their duties in enforcing the Tenth Amendment, this Court should now formally overrule *Garcia*.

Garcia's Tenth Amendment standard, based on reliance upon the political process to protect state sovereignty, is simply ineffective and inconsistent with our Constitution. The mandate provisions of the Brady Act imposed on the States by Congress exemplify this. Moreover, one federal district court has recognized *Garcia's* limitations in checking congressional excesses in dealing with the issue of crime:

> [T]he *Garcia* Court's confidence in the political process to deter the zeal of Congress to centralize prosecutorial power may have been too optimistic. Indeed, apparently irresistible political pressures to be perceived as "tough

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[16] The Second Circuit upheld the mandate provisions of the Brady Act, in part, in reliance upon what the court characterized as the "structural, not substantive" test adopted initially in *Garcia*. *Frank v. United States*, 78 F.3d 815, 826-27 (2d Cir. 1996).

> on crime" are driving Congress to federalize crimes . . . in circumstances when clear-minded, objective analysis can discern no meaningful effect on interstate commerce in the sense intended by the Commerce Clause.

United States v. Ornelas, 841 F. Supp. 1087, 1093 (D. Colo. 1994), *rev'd mem.*, 56 F.3d 78 (10th Cir. 1995).

Given federal budget limitations, the temptation for Congress to help itself to state resources is indeed irresistible:

> If Congress is allowed gratuitously to order the states to perform federal tasks, it will not have to pay for what it gets. As ideas for federal projects grow but resources lessen, the incentives will grow stronger for Congress to command the state government to perform federal programs for free.

J. Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 Geo. Wash. L. Rev. 907, 929 (1989).[17]

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[17] *See also* D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 17 (1988) ("Congress has recently forced state and local governments to administer national programs at state expense. This technique permits Congress to escape fiscal accountability for its actions."); R. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. Pa. L. Rev. 289, 312 (1984) ("If the federal government is willing to assume the full burdens of direct regulation it will not impose regulations without carefully considering the costs involved.").

The temptations underlying the Brady Act for Congress to conscript state resources will continue to manifest themselves so long as *Garcia* remains viable. That case has proved to be unworkable, as exemplified by the litigation over the Brady Act, and should be expressly overruled. The Nation would be better served if this Court adhered to the bright-line, no-commandeering standard adopted in *New York v. United States*.

CONCLUSION

Nothing in the Constitution gives Congress the authority to order a massive conscription of state and local law enforcement officials to serve federal purposes. Such conscription violates the Tenth Amendment and deprives the States of a republican form of government. Accordingly, the judgment of the court below should be reversed.

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Nos. 95-1478 and 95-1503

In the

Supreme Court of the United States

October Term, 1995

JAY PRINTZ, Sheriff/Coroner Ravalli County, Montana,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SHERIFF RICHARD MACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION SUPPORTING THE PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

Whether Congress has power under Article I, Section 8, of the United States Constitution, consistent the Tenth Amendment as interpreted in *New York v. United States*, 505 U.S. 144 (1992), to command state-created chief law enforcement officers: to search records and to ascertain whether persons may lawfully purchase handguns; to destroy records concerning handgun purchasers; and to provide the reasons for adverse determinations, as mandated by the Brady Act, 18 U.S.C. § 922(s)(2), (6)(B), and (C).

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION SUPPORTING THE PETITIONERS

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest.

PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases concerning the Tenth Amendment and limitations upon Congress' Article I powers. For example, PLF participated as amicus curiae before this Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and *United States v. Lopez*, 514 U.S. ____, 115 S. Ct. 1624 (1995).

Amicus seeks to augment the argument in the petitioner's brief by elucidating the dimensions of the powers reserved to the states under the Tenth Amendment to the United States Constitution. PLF believes that its public policy perspective and litigation experience dealing with state sovereignty issues will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.3, written permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

This case involves a challenge to the constitutionality of the Brady Handgun Violence Protection Act (the Brady Act or the Act) (18 U.S.C. § 922(s)), an amendment to the Gun Control Act of 1968. 18 U.S.C. § 922. Specifically, Sheriffs Richard Mack and Jay Printz, in separate actions, challenged the interim provisions of the Act. *Mack v. United*

States, 856 F. Supp. 1372 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

In 1993, Congress passed the Brady Act which imposes a waiting period of up to five days for the purchase of a handgun. During this waiting period, the Act requires local law enforcement officials, referred to in the Act as Chief Law Enforcement Officers (CLEOs), to perform background checks of handgun purchasers. 18 U.S.C. § 922(s)(1)(2). These background check provisions are to continue for up to five years while the federal government sets up a national criminal background check system to be maintained by the Department of Justice. 18 U.S.C. § 922(t). These interim provisions require local sheriffs, such as Mack and Printz, to serve as CLEOs, 18 U.S.C. § 922(s)(8), or to face possible criminal penalties. 18 U.S.C. § 924(a)(5). *See also Mack*, 856 F. Supp. at 1379 (holding that the threat of criminal penalties for CLEOs exists "[u]nder the plain meaning of the statute"). If the CLEO determines that the transfer of the handgun would be unlawful, the CLEO must destroy information contained in the background check after 20 days and keep all information resulting from the background check confidential, 18 U.S.C. § 922(s)(6)(B). If the CLEO disapproves the transfer, the purchaser may request an explanation for the determination. The CLEO must provide the explanation within 20 days. 18 U.S.C. § 922(s)(6)(C).

Sheriffs Mack and Printz argued, among other things, that this federal mandate to state and local officials violates the Tenth Amendment. *Mack*, 856 F. Supp. at 1378; *Printz*, 854 F. Supp. at 1506. Both District Courts held that Section 922(s)(2) of the Act, by imposing on the sheriffs a mandatory duty to conduct background checks, violated the Tenth Amendment as interpreted by this Court in *New York v. United States*, 505 U.S. 144 (1992). *Mack*, 856 F. Supp. at 1381; *Printz*, 854 F. Supp. at 1513.

The Ninth Circuit consolidated appeals from both cases and reversed the judgments of the District Courts. *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995). In finding the Act constitutional, the Ninth Circuit rejected any similarity to *New York*, *supra*. In *New York*, this Court rejected, on Tenth Amendment grounds, the "take title" provision of a federal law that gave the states the choice of regulating the disposal of radioactive waste generated within their states or taking title to the waste. *New York*, 505 U.S. at 175-76. The Ninth Circuit in *Mack* stated: "The Brady Act does not embody a mandate to the 'States' in the sovereign sense discussed in *New York*." *Mack*, 66 F.3d at 1031. "[T]he CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations" for which the states will be held politically accountable. *Id.* According to the lower court, "[t]he Brady Act is a regulatory program aimed at individuals and not the States." *Mack*, 66 F.3d at 1031. The lower court found that the duties imposed by the Act do not implicate sovereign policy-making concerns, but rather address typical law enforcement functions--the Act is "not different from other minor obligations that Congress has imposed on state officials." *Id.*

Dissenting in part, Judge Fernandez argued that the Act presents a starker version of the problem in *New York*. "Rather than ordering the state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly." *Mack*, 66 F.3d at 1035. The dissent warned that the federal government's attempt to command state executives directly poses at least as great a danger to the federal system as the usurpation of state law-making powers struck down in *New York*: "This legislation is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they

were mere federal employees. ... The time to stop this journey of a thousand miles is at the first step." *Id.*

Sheriffs Mack and Printz petitioned this Court for a writ of certiorari. Because of a split between circuits concerning the constitutionality of the CLEO provisions, the United States supported the petition.[1] Certiorari was granted by this Court on June 17, 1996.

SUMMARY OF ARGUMENT

In rushing to adopt the popular Brady Handgun Control Act, 18 U.S.C. § 922(s), Congress has contravened the Tenth Amendment by dragooning state law enforcement officers (referred to in the Act as CLEOs) to act as federal agents in implementing federal policy. The interim provisions of the Act require CLEOs to perform background checks of handgun purchasers. These mandatory provisions require CLEOs to devote themselves to the performance of federal duties regardless of what local law enforcement priorities may arise. The Ninth Circuit, in holding the Brady Act constitutional, misinterpreted and misapplied Tenth Amendment doctrine.

It has long been recognized that local law enforcement activities are uniquely central to the concept of state sovereignty and merit the strongest constitutional safeguards against federal infringement. The interim provisions of the

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[1] *Compare Koog v. United States*, 79 F.3d 452, 458-59 (5th Cir. 1996) (striking down the CLEO provisions) with *Frank v. United States*, 78 F.3d 815, 825 (2d Cir. 1996) (upholding the provisions), and *Mack*, 66 F.3d at 1931 (upholding the provisions).

Brady Act implicate the states' interest in criminal law enforcement by requiring CLEOs to enforce a federal program. By creating additional affirmative duties, the interim provisions of the Brady Act displace state law enforcement priorities with federal mandates thereby compromising the states' interest in criminal law enforcement.

The interim provisions of the Brady Act do not fit within the Tenth Amendment framework articulated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *Garcia* enunciated a process-based test for determining when states are immune from the imposition of federal burdens pursuant to the Commerce Clause. *Garcia* placed its confidence in the political process to ensure that laws will not unduly burden states. The general applicability of the minimum wage laws at issue in *Garcia* justified this reliance because the wage laws applied to individuals as well as states. The individuals could see that the federal government promulgated the laws and they could hold federal politicians accountable. In contrast, the interim provisions of the Brady Act are not directly applicable to the general citizenry, but apply only to state and local law enforcement officers. The general citizenry, therefore, cannot easily determine the source of the background check requirements administered by CLEOs. The normal operation of the political process is therefore ineffective in restraining the imposition of federal burdens on the states.

The interim provisions of the Brady Act flatly violate the standards of federalism set forth in *New York v. United States*, 505 U.S. 144. *New York* invalidated the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985. That federal law purportedly provided states the choice of regulating the disposal of radioactive waste generated within their states or taking title

to the waste. *Id.* at 175-76. In a ruling that should have been dispositive of the case at bar, the *New York* Court found this was no choice at all because Congress had commandeered the state's legislative process in violation of the Tenth Amendment. In contrast with the Ninth Circuit which found the *New York* ruling unpersuasive, *Koog v. United States*, 79 F.3d 452, recognized that *New York* controls the outcome of this case.

The interim provisions of the Brady Act impose affirmative duties on CLEOs which are tantamount to the forced state legislation that was prohibited in *New York*. These interim provisions of the Brady Act directly compel the precise manner in which state officials must administer federal regulations, subject to criminal penalties. This federal co-option of local law enforcement mechanisms--even if relatively minor and temporary in nature--violates the letter and spirit of the Tenth Amendment and should not be allowed to stand.

ARGUMENT

THE INTERIM PROVISIONS OF THE BRADY ACT VIOLATE THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the

> states, are reserved to the states respectively, or to the people.

Constitution of the United States, Amendment X. The language of the amendment reflects the concern of the drafters that the jurisdiction of the central government should extend "to certain enumerated objects only, and leave ... to the several states a residuary and inviolable sovereignty over all other objects." *The Federalist No. 39* (January 16, 1788) at 194 (J. Madison) (Bantam ed. 1982) (The Federalist Papers). By imposing federal regulatory requirements into a field of inherent state sovereignty, and by impressing state officers to administer federal regulations, the interim provisions of the Brady Act exceed the permissible limits of the federal government's jurisdiction.

A. The Interim Provisions of the Brady Act Impermissibly Interfere with an Inherent Aspect of State Sovereignty

Sheriffs Mack and Printz are local officials with critical state law enforcement duties. By the Brady Act's own definition, they bear the chief law enforcement responsibilities for their respective counties. 18 U.S.C. § 922(s)(8). By creating additional affirmative duties which these state officers would not otherwise be required to undertake, the interim provisions of the Brady Act interfere in the administration of the states' criminal justice systems. Regardless of what local law enforcement priorities may arise, the Brady Act requires these officers to devote themselves to the performance of federal duties.

In ruling that the interim provisions of the Brady Act do not violate the Tenth Amendment, the court below found that these regulations do not implicate "inherently central acts of a sovereign." *Mack*, 66 F.3d at 1031. In fact, however, local law enforcement activities are uniquely central to the concept of state sovereignty, and merit the strongest constitutional safeguards against federal infringement.

This Court has repeatedly recognized criminal law enforcement as being quintessentially a province of state governments. *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 245 (1989) ("the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court"); *United States v. Lopez*, 115 S. Ct. at 1631 n.3 ("'States possess primary authority for defining and enforcing the criminal law'"); *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958) (the bulk of authority to legislate on criminal justice is the responsibility of the individual states). Most recently, in *United States v. Lopez*, this Court noted that "[u]nder the theories that the Government presents ... , it is difficult to perceive any limitation on federal power, *even in areas such as criminal law enforcement or education where States historically have been sovereign.*" *Lopez*, 115 S. Ct. at 1632 (emphasis added).

The reservation of sovereignty to the states in the field of criminal justice is so compelling that this Court has held that a restitution obligation imposed as part of a state criminal sentence may not be discharged in federal bankruptcy proceedings, *Kelly v. Robinson*, 479 U.S. 36, 47 (1986); and that the federal courts must generally abstain from enjoining state criminal proceedings, even where a state criminal statute is allegedly unconstitutional. *Younger v. Harris*, 401 U.S. 37, 45 (1971). The principle announced in

Younger has been extended to require federal court abstention where an injunction is sought against state criminal law enforcement bodies. *See Rizzo v. Goode*, 423 U.S. 362, 380 (1976), *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

In the case at bar, the interim provisions of the Brady Act implicate the states' interest in criminal law enforcement by displacing state law enforcement priorities with federal mandates, thereby forcing the states to reallocate law enforcement resources from state duties to federal duties. The court below erred in ruling that this interference does not implicate "inherently central" aspects of state sovereignty. Because the nature of the state interest which is compromised by the interim provisions of the Brady Act is unquestionably a power reserved to the states by the Constitution, the provisions at issue conflict with the federal structure protected by the Tenth Amendment.

B. The Interim Provisions of the Brady Act Undermine the Process-Based Protections of Political Accountability Enunciated by This Court in Garcia

The court below upheld the interim provisions of the Brady Act in part by reference to this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528:

> There are numbers of ways in which the federal government is permitted to secure the assistance of state authorities in achieving federal legislative goals. First and most directly, the federal government may coerce the states and their employees into complying with federal laws

> of general applicability. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Mack, 66 F.3d at 1029. However, the constitutional issues implicated in this case differ from those in *Garcia* in fundamentally important respects.

In *Garcia*, this Court enunciated a process-based test for determining when states are immune from the imposition of federal burdens pursuant to the Commerce Clause. Rather than examining the governmental *function* at issue (such as law enforcement), the *Garcia* Court focused on the operation of the political process as a limitation on federal excesses:

> Any substantive restraint on the exercise of Commerce Clause powers must find its justification in ... possible failings in the national political process rather than ... a "sacred province of state autonomy."

Garcia, 469 U.S. at 554.

What made this test plausible in *Garcia* was the procedural transparency of the regulations at issue in that case--the extension of federal wage-and-hour legislation to certain state employees.

"Because the wage laws applied directly to individuals, as well as to states, individuals could see that the federal government promulgated the laws and could hold federal politicians accountable." Note, *Constitutional Law--Tenth Amendment--Ninth Circuit Holds Interim Enforcement Provisions of the Brady Bill Constitutional*, 109 Harv. L. Rev. 1833, 1836.

In the decision below, the Ninth Circuit found the interim provisions of the Brady Act to be equivalent to *Garcia's* generally applicable federal legislation, characterizing the challenged measure as "a regulatory program aimed at individuals and not the States." *Mack*, 66 F.3d at 1031. In fact, however, the Brady Act provisions clearly ***violate*** *Garcia's* process-based Tenth Amendment test.

The interim provisions are not directly applicable to individual citizens, but only to certain state officials. Because voters cannot easily determine the source of the registration requirements administered by Sheriffs Printz and Mack, political accountability breaks down. The normal operation of the political process is therefore ineffective in restraining the imposition of federal burdens such as those at issue in this case. Impressing state officials to administer federal regulations "may create a political curtain between the federal 'actors' who pull the strings and the state 'puppets' who move the arms of the federal government--a situation that tends to render the government unaccountable to the polity."[2] Note, *Constitutional Law*, 109 Harv. L. Rev. at 1838.

The *Garcia* Court placed its confidence in the political process to "ensure[] that laws that unduly burden the States

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[2] Concern for governmental accountability ultimately derives from a concern for individual liberty. "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities .... To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. at 181.

will not be promulgated." *Garcia*, 469 U.S. at 556. In the case at bar, however, the provisions at issue are not directly applicable to the general citizenry; moreover, the very nature of the interim provisions of the Brady Act generates confusion as to the political level responsible for the registration requirements. Consequently, the Brady Act provisions cannot be upheld under this Court's *Garcia* doctrine.

C. The Interim Provisions of the Brady Act Compel State Officials to Administer a Federal Regulatory Program in Violation of the Constitutional Standards Set Forth by This Court in New York v. United States

In upholding the interim provisions of the Brady Act, the Court below rejected the guidance of one of this Court's leading Tenth Amendment cases, *New York v. United States*, 505 U.S. 144. In *New York*, this Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, a federal law that gave the states the choice of regulating the disposal of radioactive waste generated within their states or taking title to the waste. 505 U.S. at 175-76. The "take title" provision was invalidated as providing no real choice at all, the Court finding that Congress had commandeered the states' legislative processes in violation of the Tenth Amendment's fundamental norms of federalism. *Id.* at 188. In a ruling that should have been dispositive of the case at bar, this Court concluded that "[t]he Federal Government may not compel the States to enact ***or administer*** a federal regulatory program." *Id.* (emphasis added).

New York has rightly been recognized as dispositive by other lower courts passing on the constitutionality of the

interim provisions of the Brady Act. For example, in *Koog v. United States*, 79 F.3d 452, the Fifth Circuit recognized "that *New York* is central to the question before us." *Id.* at 455. The *Koog* court tracked the analysis of the legislation at issue in *New York* and, concluding that the interim duties imposed on the CLEOs are tantamount to forced state legislation," *Koog*, 79 F.3d at 458, found that the Brady Act's interim provisions violated the Tenth Amendment.

In the proceedings below, however, the Ninth Circuit found this Court's *New York* ruling unpersuasive. The appellate panel found *New York* inapplicable because "[t]he Brady Act does not embody a mandate to the 'States' in the sovereign sense. The Brady Act is a regulatory program aimed at individuals and not the states." *Mack*, 66 F.3d at 1031.

As previously noted, the Ninth Circuit erred in finding local law enforcement administration to lie outside the core aspects of state sovereignty. The second point cited by the Court below--that the challenged measures impact directly on state officers rather than upon the states themselves--hardly takes this case out of the ambit of this Court's *New York* doctrine.

The interim provisions of the Brady Act directly compel the precise manner in which state officers must administer federal regulations, subject to criminal penalties. 18 U.S.C. § 924(a)(5). On their face, these provisions amount to precisely the type of forced administration of federal regulations that was prohibited by this Court in *New York*. Under the plain standards set forth by this Court, the decision below should be reversed and the interim provisions of the Brady Act should be struck down as unconstitutional.

D. If Congress Cannot Require the States to Adopt Handgun Regulations, It Likewise Cannot "Dragoon" State Employees to Administer the Interim Provisions of the Brady Act

The court below recognized that "'a direct order to regulate, standing alone, would ... be beyond the power of Congress.'" *Mack*, 66 F.3d at 1030 (quoting *New York*, 505 U.S. at 176). Nevertheless, the appellate panel upheld the interim provisions of the Brady Act because it found them addressed to "individuals and not the states." *Id.* at 1031. In other words, the court below held that Congress could lawfully impress state employees to administer regulations which it could not lawfully force their employers to adopt.

In dissent, Judge Fernandez clearly identified the error in this reasoning:

> Rather than ordering the state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly.

Mack, 66 F.3d at 1034 (Fernandez, C.J., concurring and dissenting). The challenged provisions of the Brady Act may

in fact pose a *greater* danger to federalism than direct commands to regulate:

> This legislation is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they were mere federal employees.

Id.

Congress evidently concluded that efficient administration of the Brady Act would be facilitated by impressing into service local law enforcement officials.[3] However, ease or efficiency in implementing federal policy is insufficient justification for federal intrusion on sovereign state operations where it is clear that Congress has no power to force the states to adopt such regulations of their own.

The Ninth Circuit found that the duties imposed by the Act on CLEOs are "not different from other minor obligations that Congress has imposed on state officials." *Mack*, 66 F.3d at 1031. However, the question of whether the obligations imposed by the interim provisions are "minor" is subsidiary to the issue of whether the federal government has jurisdiction to mandate state executives to administer federal regulations for the benefit of the federal government.

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[3] "It is clear that Congress sought to take advantage of the local law enforcement's familiarity with the population when the background check provision was drafted." *Frank v. United States*, 860 F. Supp. 1030, 1039 (D. Vt. 1994).

As one constitutional scholar has put it:

> [N]o one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions--in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell. The real question, therefore, is this: short of its prohibition of Armageddon, does the Constitution grant the states any judicially enforceable protection from Congress?

Laurence H. Tribe, *American Constitutional Law*, § 5-20 at 381 (2d ed. 1988).

In the words of Judge Fernandez, "[t]he time to stop this journey of a thousand miles is at the first step." *Mack*, 66 F.3d at 1034 (Fernandez, C.J., concurring and dissenting).

CONCLUSION

In reconciling congressional authority under the commerce power with the constraints of the Tenth Amendment, Justice O'Connor has noted, "[i]t is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution." *Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting). In this case Congress, in rushing to adopt the popular Brady Act, has contravened the Tenth Amendment by dragooning state officials to act as federal agents in implementing federal policy.

The interim provisions of the Brady Act compel state executives to enforce federal regulations, for the benefit of the federal government, in a field of inherent state sovereignty. These provisions are not subject to the normal restraints of the political process relied on by this Court in *Garcia*, and flatly violate the standards of federalism set forth in *New York v. United States*. This federal co-option of local law enforcement mechanisms--even if relatively minor and temporary in nature--violates the letter and spirit of the Tenth Amendment and should not be allowed to stand.

DATED: August, 1996.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

SHERIFF RICHARD MACK,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondents.

AMICUS BRIEF ON BEHALF OF DOCTORS FOR INTEGRITY IN POLICY RESEARCH, DOCTORS FOR RESPONSIBLE GUN OWNERSHIP, AND THE LAWYER'S SECOND AMENDMENT SOCIETY IN SUPPORT OF PETITIONER SHERIFF RICHARD MACK

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INTEREST OF THE AMICI

All parties in this appeal have graciously consented to the filing of this brief which supports the position of Petitioner Sheriff Richard Mack. These consents have been filed with the Clerk of the Supreme Court.

1. Amicus DOCTORS FOR INTEGRITY IN PUBLIC RESEARCH

Doctors for Integrity in Policy Research, Inc. (DIPR), a non-profit corporation, is a national "think tank" of medical school professors, researchers, and practicing physicians who are committed to exposing biased and incompetent research, editorial censorship, and unsound public policy. DIPR con-

ducts review research, publishes and publicizes its findings, and, to promote sound public policy, testifies before Congressional and other legislative committees and participates in litigation.

Though DIPR has decried the politicization of AIDS research, pharmaceutical "ghost writing" of research for "name" authors, and fabrication of breast cancer research data, nowhere is substandard science more prevalent than in the medical literature on guns and violence. DIPR's research projects have been published in the peer-reviewed medical literature. It is also active in exposing the waste of tax payer money not only in funding of substandard and politicized research, but also in the illegal use of tax money for political lobbying and diversion of funds by the Centers for Disease Control's National Center for Injury Prevention and Control.

2. Amicus DOCTORS FOR RESPONSIBLE GUN OWNERSHIP

Doctors for Responsible Gun Ownership (DRGO) is a nationwide network of physicians and other health professionals who support the safe and lawful use of firearms. DRGO is a project of The Claremont Institute, a policy analysis "think tank" in Claremont, California. DRGO's members come from academia, the military, private practice, and medical school student bodies. DRGO's mission is to bring balance to the medical debate on firearms. It brings to public and medical forums the abundant scientific evidence which militates in favor of safe and prudent use of firearms by law-abiding citizens.

3. Amicus THE LAWYER'S SECOND AMENDMENT SOCIETY

THE LAWYER'S SECOND AMENDMENT SOCIETY (LSAS) is a non-profit California corporation head-

quartered in Encino, CA. LSAS fosters open, rigorous discussion of the constitutional right to arms. Its purposes include sponsoring legal, historical and philosophical research on the topic and stimulating greater public knowledge and understanding of the Second Amendment. The LSAS's specific activities include writing articles, and conducting research for publication in legal and other periodicals, providing speakers on the issue of the individual right to keep and bear arms, publishing its newsletter, "The Liberty Pole," and participating in litigation regarding the Second Amendment.

DISCUSSION

I

INTRODUCTION

Firearms in the hands of Americans are overwhelmingly a net benefit to society. The vast weight of the evidence shows firearms in the hands of law-abiding citizens actually reduce violence and crime.

Due to the enormous benefits of firearms in society in terms of the lives saved, injuries prevented, medical costs averted, and property protected by citizens with firearms, this Court is respectfully requested to consider that, not only is the Brady Law offensive to the Tenth Amendment, it also seriously hampers the citizens' inalienable right of self-defense.

Amici will demonstrate the blatant falsehood of repeated claims that the Brady Law has prevented "Sixty thousand" criminals from obtaining firearms. *Amici* provide this documentation for the sole purpose of showing, unequivocally, no compelling government interest justifies the Brady Law. Far from a public policy disaster, dismantling the Brady Law is a public benefit.

II

GUN CONTROL IS NOT CRIME CONTROL

To place the specifics of the Brady Law in perspective, the larger perspective of gun control must be examined. A forthcoming study of 15 years' data by University of Chicago researchers shows that "1,570 murders; 4,177 rapes; and over 60,000 aggravated assaults would have been avoided yearly" if states with restrictive laws would reform those laws to make it easier for mentally competent, law-abiding adults to carry concealed handguns for protection outside the home.[1]

The scholarly literature increasingly vindicates firearms as "pathogens" of violence, and it exposes gun control as a "placebo" or "suicide pill," rather than a "cure" for gun violence.[2] In fact, the strategy of repackaging gun control as a "public health" measure[3] resulted because of the near unanimous recognition, within the criminological scholarly literature, that gun control was a failure as crime or violence control.[4]

Stringent gun control does not, and cannot, keep firearms out of the hands of willful predators who ignore laws against drug trafficking, rape, and murder. Indeed, that is why they

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[1] Lott JR and Mustard DB. "Crime, Deterrence, and Right-to-Carry Concealed Handguns." Journal of Legal Studies. January 1997, forthcoming.

[2] Suter EA, Waters WC, 4th, Murray GB, Hopkins CB, Asiaf J, Moore JB, Fackler M, Cowan DN, Eckenhoff RG, Singer TR, et al. "Violence in America — Effective Solutions." Journal Med. Assoc. Ga. June 1995; 84(6):253-263.

[3] Sugarmann J and Rand K. Cease Fire - A comprehensive strategy to reduce violence. Washington DC: Violence Policy Center. 1993.

[4] This voluminous literature is best summarized in Kleck G. Point Blank: Guns and Violence in America. New York: Aldine de Gruyter. 1991.

are called "criminals." By whatever increment any firearm control measure inconveniences criminals, those criminals are not (the wishful and repeated claims of gun control advocates to the contrary notwithstanding) "prevented from obtaining guns." They are merely displaced into the fast and uncontrolled illegal gun market.

Predators who sell crack by the gram or heroin by the kilogram, can quickly find a black-market gun, and they can certainly afford the high prices for such firearms, without the inconvenience of a background check or waiting period. Gun control merely impedes gun purchases by law-abiding citizens, who ultimately become the predators' victims. Victim disarmament does not saves lives, it costs lives. Quite simply, gun control is a counter-productive, even deadly, failure.

In short, to the extent the Brady Law impedes the access of law-abiding citizens to the protection of firearms, the Brady Law simply helps criminals, and it assures their continuing job safety. The much ballyhooed "public health approach to gun violence" merely spins "new clothes [a lab coat] for the emperor," offering an insidiously amoral, value-neutral perspective on gun deaths.

III

FIREARMS ARE NOT A "MEDICAL ISSUE"

The gun control advocacy literature from the "medical community"[5,6] shows that fully two-thirds of gun homicide

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[5] McGonigal MD, Cole J, Schwab W, Kauder DR, Rotondo MF, and Angood PB. Urban firearms deaths: a five-year perspective. J Trauma. 1993; 35(4): 532-36.

[6] Hutson HR, Anglin D, and Pratts MJ. Adolescents and children injured or killed in drive-by shootings in Los Angeles. New England Journal of Medicine, 1994; 330: 324-27.

"victims" are, in fact, drug dealers and their customers who wreak tremendous human and economic havoc upon society. In failing to account for this, the medical literature cannot and does not honestly assess these deaths.

Whether measured in human or economic terms, the peer-reviewed cost-benefit analysis finds an overwhelming net benefit of guns in our society. Significantly more lives and money are saved using firearms, than are lost using them.[7]

Without exception, all 14 studies of defensive firearm use suggest Americans use firearms defensively from 1 million to 2.5 million times annually.[8] The largest-scale, most comprehensive study of protective firearm use, Kleck & Gertz's National Self-Defense Survey, suggests about 2.5 million protective uses by adult Americans against human attackers each year. This means lives saved, injuries prevented, medical costs averted, and property protected.

About 400,000 of those who used firearms for self-defense believe they would have lost their lives had they not had a firearm for protection. Even if 90 percent of these firearm defenders were mistaken, the number of lives saved using firearms still outnumbers the lives taken using firearms by thousands. In some 98 percent of these defensive uses, the gun is not even fired. In only about 0.1 percent (one-in-a-thousand) of the protective uses is the attacker killed.[9]

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[7] Suter EA, et al. "Violence in America — Effective Solutions." J Med Assoc Ga June 1995; 84(6):253-263.

[8] Kleck G and Gertz M. "Armed Resistance to Crime: the Prevalence and Nature of Self-Defense with a Gun." Journal of Criminal Law & Criminology. Summer 1995:; 86:143-186.

[9] Suter EA, et al. "Violence in America — Effective Solutions." J Med Assoc Ga June 1995; 84(6):253-263.

The analysis set forth above exposes the fundamental flaw in research sponsored by the Centers for Disease Control (CDC) which purportedly shows "a gun owner is 43 times more likely to kill a family member than an intruder."[10] In fact, firearm defenders apprehend or repel attackers one thousand times as often as they kill them. The flawed and politicized nature of the CDC's much publicized research has been repeatedly exposed in the peer-reviewed and peer-acclaimed scientific literature [11,12] and before Congress. [13,14]

In a front page investigation on May 1, 1996, the Wall Street Journal[15] exposed the CDC's campaign of strategic factual misrepresentation regarding AIDS research. The

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[10] Kellermann AL. and Reay DT. "Protection or Peril? An Analysis of Firearms-Related Deaths in the Home." N Engl J. Med 1986. 314: 1557-60.

[11] Kates D, Schaffer HE, Lattimer JK, Murray GB, and Cassem EW. "Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?" Tennessee Law Review. Spring 1995; 62(3): 513-596.

[12] Suter EA. "Guns in the Medical Literature — A Failure of Peer Review." Journal of the Medical Association of Georgia. March 1994: 133-48.

[13] Suter EA, National Chair, Doctors for Integrity in Research & Public Policy. Testimony before the Subcommittee on the Constitution of the Judiciary Committee of the United States Senate. March 23, 1994

[14] Waters, WC 4th, Eastern Director, Doctors for Integrity in Policy Research, Inc.; Wheeler TW, President, Doctors for Responsible Gun Ownership; Faria M, Professor of Neurosurgery and Adjunct Professor of Medical History, Mercer University, former editor of the Journal of the Medical Association of Georgia; and Kates DB, civil rights attorney and criminologist. Testimony before the House of Representatives Committee on Appropriations, Subcommittee on Labor, Health and Human Services and Education. March 6, 1996.

[15] Bennett A and Sharpe A. "Health Hazard: AIDS Fight Is Skewed By Federal Campaign Exaggerating Risks." Wall Street Journal. May 1, 1996, pp 1 & 6.

CDC has waged a similar campaign of strategic lies regarding guns and violence.

Amici present this data to encourage this Court to view the flawed and politicized "science" that has polluted the public debate, media, and common wisdom regarding firearms in our society with a healthy skepticism. Such rigorous objectivity is essential in examining the key point of this brief: that not only does the Brady Law violate the Tenth Amendment, it is useless, and perhaps even dangerously counter-productive.

IV

PIERCING THE FALSE CLAIMS OF BRADY LAW BENEFITS

President Clinton asserted "Sixty thousand people with criminal records have not been able to buy handguns because of the passage of the Brady Bill,"[16] and the law "has made us a safer country."[17]

The President's remarks encapsulate all that is wrong with claims of the Brady Law's supposed benefits. Even the Government Accounting Office (GAO) survey,[18] the source of President Clinton's projected figure, stated its Brady Law sample data could not be projected to the nation at large (as

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[16] Clinton WJ, President of the United States of America. Remarks at the Democratic National Committee Gala. Washington Convention Center. Washington DC. May 8, 1966 10:32 p.m. EDT.

[17] Clinton WJ, President of the United States of America. Remarks to the people of DesMoines. Knapp Center, Drake University, Des Moines IA. February 11, 1996 2:05 p.m. CST.

[18] United States General Accounting Office. "Report to the Committee on the Judiciary — House of Representatives — Gun Control: Implementation of the Brady Handgun Violence Prevention Act." GAO/GGD-96-22 Washington DC: USGAO. January 1996. Hereinafter "GAO survey."

President Clinton did) to arrive at the "Sixty thousand" figure. The GAO survey shows that approximately half of the individuals prevented from purchasing firearms by Brady Law background checks, were not legally disqualified from firearm ownership.[19]

Significantly, the GAO did not conduct a national survey of law enforcement officials to arrive at its figures. Instead, it judgmentally selected and surveyed 20 law enforcement jurisdictions. The results of GAO's study, therefore, are not projectable to the universe of denials nationwide.[20] Unfortunately, Brady Law advocates ignore this important caveat from their own data source.

Additionally, such claims that "sixty thousand" illegal gun purchases were thwarted by the Brady Law are based upon denials in the entire nation, including the Brady-exempt states. However, Brady Law advocates cannot honestly claim the benefits obtained in states exempt from Brady Law provisions. The GAO survey found approximately half of Brady Law background check denials, the so-called "criminals," were erroneous. Half of these alleged "criminals" were flagged due to administrative errors (such as forms prepared or mailed incorrectly, innocents whose names are similar to felons, non-disqualifying misdemeanor traffic convictions, or other trivial "crimes" such as fishing without a license and failure to license dogs).

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[19] GAO survey Chapter 2.

[20] GAO survey at page 5.

Similarly, data from the National Institute of Justice[21] and from the Bureau of Alcohol, Tobacco and Firearms[22] suggest that, of those actual criminals caught by the Brady Law background checks, firearm purchase was not prevented; true criminals were merely displaced from the legal retail market into the illegal black market unaffected by the Brady Law.

Only some seven percent of criminals' handguns are obtained from retail sources, so controls on retail firearm sales cannot be expected to significantly reduce criminals' access to firearms. Despite exaggerated claims by the administration and gun prohibition lobbyists[23] regarding the success of the Brady Law, the Bureau of Alcohol, Tobacco and Firearms (BATF) has acknowledged what little evidence there is, is only anecdotal.[24]

Indeed, of the actual felons identified by Brady Law background checks during the first 1½ years since it was enacted, only seven had been successfully prosecuted (four received probation and three received prison sentences of between one to two years).

Since those denied the ability to purchase a firearm by the Brady Law are merely displaced into the "black market," the Brady Law's minimal benefit is really no benefit at all. Even President Clinton, himself a staunch defender of the

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[21] Wright JD and Rossi PH. Armed and Considered Dangerous: a Survey of Felons and their Firearms. Hawthorne, NY: Aldine de Gruyter. 1986.

[22] Bureau of Alcohol, Tobacco and Firearms. "Protecting America: The Effectiveness of the Federal Armed Career Criminal Statute." Washington DC: US DOJ BATF. Undated. Page 28.

[23] Aborn R, President of Handgun Control, Inc. Letter to the editor. Washington Post. September 30, 1994.

[24] Howlett D. Jury still out on success of the Brady Law. USA Today. December 28, 1994. p A-2.

Brady Law, had to admit the ultimate failure of that law: "It is true that you can still buy an illegal gun with cash in the streets."[25]

The real purveyors of violence, the vicious predators with lifelong histories of violence, are the criminals untouched by the Brady Law or other firearm laws. A meticulous scholarly analysis published in The Journal of Criminal Law & Criminology[26] reviewed these and other problems that expose the Brady Law not as a political boon, but as a public policy nightmare.

There is no persuasive evidence that the Brady Law has made society safer. Prior to implementation of the Brady Law in 1993, FBI Uniform Crime Report data showed that, in the 24 states and the District of Columbia where laws already existed to delay handgun purchases, violent crime was 34.6 percent higher, robbery was 76.9 percent higher, aggravated assault was 21.6 percent higher, and homicide was 3.7 percent higher.[27]

Following the implementation of the Brady Law, FBI Uniform Crime Report data from 1993 and 1994 show homicide dropped about twice as much in the 22 states exempt from the provisions of the Brady Law (a 7.3 percent drop from 1993 to 1994) in comparison with the 28 states subject to the provisions of the Brady Law (a 3.8 percent drop from 1993 to 1994).

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[25] Clinton WJ, President of the United States of America. Remarks on MTV's "Enough is Enough" forum on crime. Kalorama Studio. Washington DC. April 19, 1994 11:30 a.m. EDT.

[26] Jacobs JB and Potter KA. "Keeping Guns Out of the 'Wrong' Hands: The Brady Law and the Limits of Regulation." Journal of Criminal Law & Criminology. Summer 1995:; 86:93-120.

[27] Federal Bureau of Investigation, US Department of Justice. Uniform Crime Reports: Crime in the United States 1992. Washington DC: US Government Printing Office. 1993. Table 5.

Total violent crime dropped exactly twice as much in the 22 states exempt from the provisions of the Brady Law (a 4.8 percent drop from 1993 to 1994) in comparison with the 28 states subject to the provisions of the Brady Law (a 2.4 percent drop from 1993 to 1994).

Robbery dropped over three times as much in the 22 states exempt from the provisions of the Brady Law (an 8.8 percent drop from 1993 to 1994) in comparison with the 28 states subject to the provisions of the Brady Law (a 2.7 percent drop from 1993 to 1994).

Since most high-crime states and the District of Columbia were exempt from Brady Law provisions, the Brady Law would not have been expected to have had an effect on these jurisdictions. Instead, the Brady Law imposed background check and waiting period requirements upon traditionally low-crime states, *a priori* reason to have low expectations for Brady Law results.

At present, the District of Columbia and most high-crime cities are exempt from the Brady Law waiting period. Ten such high-crime cities (New York City, Chicago, Los Angeles, Detroit, District of Columbia, Baltimore, St. Louis, Phoenix, Atlanta, Richmond) accounted for 23 percent of 1994 US homicides.[28] "If it saves one life," but costs many lives, what then? The Brady Law is a failure, and predictably so.

In short, FBI Uniform Crime Report data from 1993 and 1994[29] actually show the 22 states exempt from Brady Law

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[28] Federal Bureau of Investigation, US Department of Justice. Uniform Crime Reports: Crime in the United States 1994. Washington DC: US Government Printing Office. 1995. Table 5.

[29] Federal Bureau of Investigation, US Department of Justice. Uniform Crime Reports: Crime in the United States 1993. Washington DC: US Government Printing Office. 1994. Table 5. Also, Federal Bureau of Investigation, US Department of Justice. Uniform Crime Reports:

provisions are safer than the 28 states subject to Brady Law provisions.

Contrary to the assertions of some advocates that dismantling the Brady Law will result in an epidemic of violence or a public policy disaster, the evidence suggests striking the Brady Law will be a benefit to the public safety.

V

CONCLUSION

Pick up any newspaper on any given day, and there will undoubtedly be a crime-related article which illustrates *amici's* contention that innocents suffer and die when they are denied timely access to firearms for self defense.

The Brady Law waiting period and the extraordinary number of Brady background check errors deny timely access to dozens of thousands of good, needful and law-abiding people. In so doing, *amici* contend the Brady Law costs many more lives than it saves because it denies or hampers citizens' inalienable right to defend themselves, their families, and their homes.

Amici strenuously object to the concept of citizens having to satisfy qualifications to exercise their constitutionally guaranteed right to keep and bear arms. However, if despite these most strenuous objections, there is to be an infringement of the right to self-defense and right to keep and bear arms, *amici* respectfully suggest this Court let it be the least intrusive infringement available; namely, an "instant check" system freely adopted by states, rather than imposed by the Brady Law's usurpation of Tenth Amendment state powers.

On a purely pragmatic level devoid of constitutional concerns (an unprincipled position we neither adopt nor

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Crime in the United States 1994. Washington DC: US Government Printing Office. 1995. Table 5.

recommend), there are no benefits whatsoever from the Brady Law except those that are better served by instant check systems.

Not only is the Brady Law offensive to the Tenth Amendment, it is a political fraud, a public policy failure, and it should be dismantled in its entirety.

Dated: August 16, 1996

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IN THE
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Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

RICHARD MACK,
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On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO), a federation of 75 national and international unions representing more than

13,000,000 working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for by the Rules of this Court.

SUMMARY OF ARGUMENT

Petitioners base their constitutional challenge to the Brady Act not on the text of the Constitution, but on state sovereignty "postulates," p. 6 *infra*, which are said to lie behind the text. It is true that the Constitution creates a system of dual sovereignty. But it is equally true that within the area of enumerated powers delegated to the federal government that government is supreme. It was the Framers' plan that the constraint on the federal government's exercise of its delegated powers and the protection of state authority from such exercise is nothing more, or less, than the political will of the people.

From its earliest days, this Court has understood the constitutional scheme thusly and has upheld federal laws enacted pursuant to an enumerated power without regard to their impact on the States. In recent years, this constitutional understanding has been put into question, as the Court has in various ways sought to cabin Congress' Commerce Clause powers based on considerations of state sovereignty. The Court, by its own assessment, has tread "an unsteady path," p. 10 *infra*, in that effort. In large part that is because, in our constitutional system, the States are not sovereign in any previously-known sense of the term. As a result, the Court has confronted the greatest perplexities in fashioning a principled state sovereignty limit on the enumerated powers of Congress.

The one Commerce Clause area in which, under the decided cases, state sovereignty concepts do come into the constitutional calculus is when Congress "use[s] the States as implements of regulation." P. 12 *infra*. Taking that as a proper starting point, we show that for two independent reasons the statute at issue here does not "use

the States" in a way which impermissibly invades state sovereignty.

First, the Brady Act imposes obligations not on the States, but on the "chief law enforcement officer ("CLEO") of the place of residence" of a would-be handgun purchaser. In general, the CLEO is a local—rather than a state—official, and in this case the *only* petitioners are two county sheriffs who are not officers of the State and who do not have standing to assert the rights of any state officers who might be covered by the Brady Act.

In the context of the Eleventh Amendment—which is, of course, an expression of state sovereignty—this Court "has consistently refused to . . . afford protection to political subdivisions such as counties and municipalities." P. 14 *infra*. And, if the judicial power of the United States can be exercised over counties notwithstanding the express recognition of state sovereignty contained in the Eleventh Amendment, there is nothing in the unstated "postulates" of the Constitution to prevent the legislative power from being exercised over these very same bodies.

Second, even if, *arguendo*, the Brady Act were addressed to the States, the duties that Act imposes do not offend core notions of state sovereignty. The Constitution does not allow the Congress to "commandeer[] the legislative process of the States." P. 17 *infra*. But the Brady Act does not do so: it imposes a "ministeral mandate," p. 19 *infra*, which requires state officials to participate, in a limited way and for a limited time, in administering a federal law embodying a clear, explicit and complete set of federal policy judgments.

The Framers of the Constitution contemplated that state officials would be used in this way by the federal government, as *The Federalist Papers* make clear. Indeed, numerous early federal statutes imposed administrative duties on the States. And whereas commandeering state

legislative power undermines the "distinct and discernable lines of political accountability" which are necessary to the federal system, p. 23 *infra*, a "ministerial mandate" like the one at issue here, does not do so. Indeed, this mandate is analytical quite similar to other mandates which have been upheld by this Court.

It is not necessary to dispose of the instant case to go so far as to hold that a mandate to state officials to assist in the administration of a federal law is *always* constitutionally permissible. Rather, given that the mandate here imposes a limited burden for a limited, interim period of time on local officials and does so in the service of a vitally-important federal regulatory interest which cannot be advanced without State involvement, it is enough here to hold that ministerial mandates are not *per se* unconstitutional and that in the instant case the federal interests so clearly predominate as to permit this mandate.

ARGUMENT

Congress Acted Within Constitutional Limits in Requiring Local Law Enforcement Officials, During an Interim Period Until a National System Is Created, to Conduct Limited Investigations of Would-Be-Purchasers of Handguns as Part of a Federal Program to Regulate Handgun Sales

A. Introduction

The Brady Act, P.L. 103-159, establishes a set of rules to regulate the sale of handguns by federally-licensed importers, manufacturers, and dealers of firearms. *See* 18 U.S.C. § 922(s). The question posed here is whether, in enacting certain of those rules, Congress exceeded its constitutional authority.

It is beyond dispute that the firearms industry in all its interrelated manufacturing, transportation and sales facets, is one that " 'substantially affects' interstate commerce," *United States v. Lopez*, —— U.S. ——, 115 S.Ct. 1624,

1630 (1995). The sale of such an inherently dangerous product, made for and moved in commerce, is thus a proper object of federal regulation under the Commerce Clause. Neither petitioners nor their supporting *amici* seriously claim otherwise.

Petitioners and their *amici* likewise do not seriously contend that, in the instant exercise of its Commerce Clause power, Congress transgressed an express limitation on its authority such as those contained in the Bill of Rights. To be sure, the briefs on the other side do invoke the Tenth Amendment. But that Amendment states a "tautology," *New York v. United States*, 505 U.S. 144, 157 (1992), or a "truism that all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124 (1941). The Tenth Amendment, in other words, "was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people" and "added nothing to the instrument as originally ratified." *United States v. Sprague*, 282 U.S. 716, 733 (1931).[1] Indeed, the framers of the Tenth Amendment squarely rejected a proposal to provide that power not "expressly" delegated to the federal government be reserved to the States for fear that such a proposal would work a substantive change in the constitutional scheme by

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[1] In proposing the Tenth Amendment to the First Congress, Madison stated:

> I find from looking into the amendments proposed by the States conventions that several are particularly anxious that it should be declared in the Constitution that the powers not herein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allows that the fact is as stated. I am sure I understand it so, and I do therefore propose it. [*History of Congress* 441 (June 8, 1789)]

negating federal powers that might arise "by implication." I *Annals of Cong.* 790.[2]

Lacking any basis in the constitutional text for the claim that Congress exceeded its constitutional authority, petitioners bid this Court to set out in a ship without a rudder, under a sky without a guiding star, on a boundless constitutional sea. Petitioners rest their case on state sovereignty "postulates" which are said to lie "[b]ehind the words of the constitutional provisions." *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). But because those postulates point in too many directions at once to guide the way, we would be derelict if we did not begin by underlining what a perilous voyage petitioners propose for a court of law charged with interpreting a written Constitution.[3]

1. Petitioners begin from the proposition that the Constitution is a "system of dual sovereignty"—" 'an indestructible Union, composed of indestructible States.' " *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). As Justice Kennedy has put the point, "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and federal each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, —— U.S. ——, 115 S.Ct. 1842, 1872 (1995) (Kennedy, J., concurring).[4]

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[2] *See also Ashwander v. TVA*, 297 U.S. 288, 330 (1936); *Wright v. Union Central Ins. Co.*, 304 U.S. 502, 516 (1938); *Case v. Bowles*, 327 U.S. 92, 101-02 (1946); *Sperry v. Florida Bar*, 373 U.S. 379, 403 (1960).

[3] *See also* Justice Frankfurter's warning in *New York v. United States*, 326 U.S. 572, 581 (1946):

> Any implied limitation upon the supremacy of the federal power . . . brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges

[4] Perhaps the best articulation by the Framers of the theory underlying dual sovereignty is found in Madison's *Federalist Paper* No. 51, which the Court quoted in *Gregory*:

At the same time there is an equal and opposite postulate, no less important to the constitutional structure than the first: that within the area of enumerated powers delegated to the federal government, that government is supreme. This postulate finds its most concrete expression, of course, in the Supremacy Clause. And, that Clause in turn embodies a broader understanding stated by Madison:

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States. [II *Annals of Cong.* 1897]

Madison did not blink at the implications of this second postulate for the first. *Federalist Paper* No. 45 (p. 288) poses the question of whether "the powers transferred to the federal government . . . will be dangerous to the portion of authority left in the several States." Madison's answer (in *Federalist Paper* No. 46) is straightforward: such a possibility is inherent in the Constitution's plan; the constraint on the federal government's exercise of its delegated powers and the protection of state authority from such exercise is nothing more, or less, than the political will of the people.

In Madison's words, the "ultimate authority" in determining how far the federal government might go in exercising its delegated powers, "resides in the people alone," and that being so "it will not depend merely on the comparative ambition or address of the different govern-

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In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. [*The Federalist Papers* No. 51, p. 323 (C. Rossiter ed. 1961)]

ments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other." *Federalist Paper* No. 46, p. 294. If, as seemed most unlikely to Madison, the "people should in future become more partial to the federal than to the State governments . . . the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due." *Id.* pp. 294-95.

In short, the framers "were willing to confront an inevitably powerful opposition to ratification based on the popular fear of centralized government, even at the risk of losing all, precisely because they thought all had been nearly lost already." [5]

From its earliest days, this Court has understood the constitutional scheme thusly. Since *McCulloch v. Maryland*, 4 Wheat. 316 (1819) and *Gibbons v. Ogden*, 9 Wheat. 1 (1824), the basic principle has been that "the

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[5] Scheiber, *Federalism and the Constitution: The Original Understanding in* L. Friedman & H. Scheiber (eds.), *American Constitutional Law and Order* 86 (1978).

Indicative of this philosophy, the Constitutional Convention defeated a proposal which would have precluded Congress from "interfer[ing] with the government of the individual states in any matter of internal policy which respect the government of such states only." W. Murphy, *The Triumph of Nationalism* 179 (1967). The Constitutional Convention also came within one vote of adopting a proposal which would have authorized Congress to "negative" (i.e. veto) any state law, II M. Farrand (ed.), *The Records of the Federal Convention* 391 (1911), and even those who opposed this proposal did so on the ground that, in light of the Supremacy Clause, it was "unnecessary," II *id.* at 350 (Mr. Sherman), 391 (Mr. Williamson and Mr. Gouverneur Morris). And after the Constitution was ratified, the first Congress, in drafting the Bill of Rights, adopted recommendations from the States that were protective of individual rights, but rejected all recommendations aimed at enhancing state sovereignty at the expense of federal authority, such as proposals by New York, Massachusetts and Virginia to limit the federal taxing power and the federal power to regulate congressional elections. W. Murphy, *supra*, at 337, 368, 385.

government of the Union, though limited in its powers, is supreme within its sphere of action," *McCulloch*, 4 Wheat. at 405, and that to the extent Congress exercises an enumerated power, such as its power over interstate commerce, the "wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are . . . the sole restraints on which they have relied to save them from its abuse," *Gibbons*, 9 Wheat. at 197.

Under this understanding, "[w]henever . . . a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided." *United States v. Harris*, 106 U.S. 629, 636 (1883). "The power of Congress . . . is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or states is not material to be considered." *Hoke v. United States*, 227 U.S. 308, 320 (1913). And, with particular regard to the Commerce Clause power, "there is no . . . limitation upon the plenary power to regulate commerce"; a "state can no more deny the power if its exercise has been authorized by Congress than can an individual." *United States v. California*, 297 U.S. 175, 183-84, 185 (1936).[6]

2. We recognize that this constitutional understanding has been put into question over the past twenty years. That

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[6] It was on this basis that the Court in *United States v. California* sustained federal regulation of state-owned railroads. *See also California v. Taylor*, 353 U.S. 553 (1957); *Parden v. R. Terminal Co.*, 377 U.S. 184 (1964). And, it was on this basis, too, that the Court upheld federal regulation of state-owned waterfront terminals, *California v. United States*, 320 U.S. 577 (1944), and the application to the States of wage and price controls, *Case v. Bowles*, 327 U.S. 92 (1946); *Fry v. United States*, 421 U.S. 542 (1975). *See also Sanitary District v. United States*, 266 U.S. 405 (1925) (federal government may limit the amount of water Illinois could withdraw from Lake Michigan); *Oklahoma v. Atkinson*, 313 U.S. 508 (1941) (federal government may flood state-owned land to build a dam).

reassessment has stemmed from a concern that the commerce power has proved so protean in its possibilities in a political economy formed by modern financial, communications, production and transportation techniques as to pose a qualitatively different federal threat to state authority than any posed in the past. *But see United States v. Lopez, supra.*

Thus, in *National League of Cities v. Usery*, 426 U.S. 833, 841-43 (1976), the Court proceeded on the theory that a law "may be fully within the grant of legislative authority contained in the Commerce Clause," but if that law "impairs the States' integrity or their ability to function effectively in a federal system," the law may "transgress[]" what the *National League* Court deemed to be "an affirmative limitation on the exercise of [congressional] power" located in the Tenth Amendment. More recently, the Court has posited that the Commerce Clause power is not plenary but itself contains a state sovereignty limitation. *See New York*, 505 U.S. at 155-57.

Whatever the theory, the Court's jurisprudence in this area has "traveled an unsteady path." *Id.* at 160. That unsteadiness, we submit, is not a happenstance but is directly explained by the elusive nature of the "state sovereignty" concept.

"Sovereignty," Webster's tells us, means "supreme power." Yet in the United States, the States are *not* supreme in any previously-known sense of that word. The Constitution itself denies the States certain powers which, in the law of nations, would plainly be viewed as "incidents" of sovereign supremacy, such as the power to mint coints, to declare war and the like. *See* U.S. Const. Art. I, § 10.

Equally to the point, the law of nations teaches that statutes duly enacted by a sovereign are the law of the land. But, under the Supremacy Clause, there is no doubt that Congress can, without impermissibly invading state sovereignty, "displace or pre-empt state laws regulating

private activity affecting interstate commerce when these laws conflict with federal law," and can likewise "prohibit all—and not just inconsistent—state regulation of such activities." *Hodel v. Virginia Surface Mining & Recl. Assn*, 452 U.S. 264, 290 (1981). "Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Id.*

Similarly, since *Garcia v. San Antonio Metr. Transit Auth.*, 469 U.S. 528 (1985), it has come to be understood that "subject[ing] state governments to generally applicable laws"—that is "to the same legislation applicable to private parties"—does not impermissibly invade state sovereignty. *New York*, 505 U.S. at 160. While we believe that *Garcia* stands for more than that, it certainly means that much, and rightly so. After all, given the size of the public sector in relation to the overall economy, the "effectiveness of federal action" in regulating a particular market or a particular class of economic activity "would . . . be[] drastically impaired" if state actors who participate in that market or activity are *ipso facto* "left outside the reach" of such federal laws. *Fry v. United States*, 421 U.S. at 548. And, precisely because there is no basis for believing that generally applicable legislation regulating a market or a class of economic activity—as distinguished from statutes addresesd solely to the States—can pose a serious threat to the integrity of the "States as States," there is no basis for "drastically impair[ing]" the commerce power by erecting a state sovereignty shield against such legislation.

These deviations from any known concept of sovereignty demonstrate the conceptual difficulties inherent in any attempt to construct a principled state sovereignty limit on the enumerated powers of Congress—an attempt made all the more problematic by the absence of any guidance in the Constitution's text, the records of the Constitutional Convention, or in any other authoritative constitutional source.

As we stated at the outset, all of this—at the very least—bespeaks the need to proceed with the most cautious circumspection.[7] At the same time, after the divided opinions in *FERC v. Mississippi*, 456 U.S. 742 (1982) and *New York v. United States, supra*, the one Commerce Clause area in which state sovereignty concepts do most assuredly come into the constitutional calculus is when Congress "use[s] the States as implements of regulation." *New York*, 505 U.S. at 161.

Without a doubt the Brady Act does so—albeit in a limited way and for a limited time. But, as we proceed to show, for two independent reasons, the statute at issue here does not "use the States" in a way which impermissibly invades state sovereignty.

B. Commands Addressed to Local Law Enforcement Officials, Such as the County Sheriffs Who Are Petitioners Here, Do Not Impermissibly Infringe State Sovereignty

In both *FERC* and *New York*, the statutes at issue, by their very terms, imposed obligations directly upon the States. In *FERC*, the Public Utility Regulatory Policies Act of 1978, P.L. 95-617, 92 Stat. 3117, required "each *State* regulatory authority" to make certain determinations, 16 U.S.C. §§ 2621(a), 2622(a), 2623(a), and to "implement" certain rules promulgated by FERC. And in *New York*, the Low-Level Radioactive Waste Policy Amendments Act of 1985, P.L. 96-573, 94 Stat. 3347, provided that "If a *State* . . . is unable to provide for the disposal of . . . waste . . . each *State* in which such waste is generated . . . shall take title to the waste, be obligated

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[7] In other contexts, this Court has sounded a similar warning. *See, e.g., Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989) (criticizing rule "not found in the text of the Constitution or in any place else one would expect to find a constitutional principle" on the grounds that "the bounds of the inquiry" under such a rule are "essentially indeterminate" and results in "a web of legal rules that are increasingly intricate" and which bear little "resembl[ance to] . . . a body of constitutional doctrine").

to take possession of the waste, and shall be liable for all damages . . . incurred . . . as a consequence of the failure of the *State* to take possession." In both cases the statute was challenged by a State, represented by the State Attorney General. The sole question thus posed, given the Court's understanding of the Commerce Clause, was whether the State obligations at issue were incompatible with "core notions of state sovereignty."

In the instant case, in contrast, there is a threshold question which must be addressed. The Brady Act places obligations not on the States, but on "the chief law enforcement officer of the place of residence of the [proposed] transferee." 18 U.S.C. § 922(s)(1)(A)(i)(III), (s)(2). The "chief law enforcement officer" ("CLEO") is defined by the Act as "the chief of police, the sheriff, or an equal officer." 18 U.S.C. § 922(s)(8). In most (if not all) cases, then, the CLEO will be a *local*—rather than a state—official. And in this case in particular, the *only* petitioners are two *county* sheriffs who, under Montana and Arizona law, plainly are *not* officers of the State,[8] and who have standing to asset only their "own legal rights and interests," and *not* those of "third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1979).[9]

The question thus arises: do congressional commands to localities stand on the same state sovereignty footing as commands to States?

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[8] Montana and Arizona law both define the office of "sheriff" as a "county office," Mont. Code § 7-4-2203; Ariz. Rev. Stat. § 11-401, and make clear that it is the county—and not the State—that is responsible for funding, Mont. Code § 7-4-2502(1); Ariz. Rev. Stat. § 11-60; and supervising, Op. Mont. Att'y Gen. No. 38-85 (1980); Ariz. Rev. Stat. § 11-251.1, these offices.

[9] In narrowly limited circumstances, this Court has permitted a litigant to enjoy *jus tertii* standing. But assuming *arguendo* that there are any state officers who are covered by the Brady Act as CLEOs, petitioners have not "identified any obstacle preventing [such state-officer CLEOs] from asserting claims on their own behalf," nor have petitioners shown any "special relationship" with such hypothetical individuals. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

So far as we can ascertain, there are no decisions of this Court directly on point.[10] But this Court's Eleventh Amendment jurisprudence, if not directly controlling, is surely instructive and inexorably leads to the conclusion that state sovereignty interests are *not* implicated here.

The Eleventh Amendment is an express provision which "embodies" the "principle of state sovereignty." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). It is "rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty" and it "accords the States the respect owed them as members of the federation." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, —— U.S. ——, 113 S.Ct. 684, 689 (1993). And, this Court has given that Amendment a sweep that goes far beyond its literal words—one that protects States from suit in federal court not only by citizens of other states but equally by their own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).

Against this background, it is highly relevant that since the very day that *Hans v. Louisiana* was decided, *see Lincoln County v. Luning*, 133 U.S. 529, 530 (1890), to this, "the Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities." *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 401 (1979). Even though "such entities exercise 'a slice of state power,'" *id.*, and even though "ultimate control . . . resides with the State [which] may destroy or

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[10] In *National League of Cities*, 426 U.S. at 855-56 n.20, the Court, in a footnote, asserted that congressional laws "interfer[ing] with integral governmental services" provided by political subdivisions are "beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself." But *National League of Cities* was, of course, overruled by *Garcia*, albeit on the broader ground that Congress can regulate both States and localities. After *Garcia*, we do not believe that the footnote in *National League of Cities* is authoritative on the issue discussed in text.

reshape any unit it creates," nonetheless "cities and counties do not enjoy Eleventh Amendment immunity," *Hess v. Port Authority Trans-Hudson Corp.*, —— U.S. ——, 115 S.Ct. 394, 404 (1994). Rather, cities and counties are understood to be separate and distinct entities so that a suit against such an entity is not the same as a suit against the State.[11]

Similarly, in defining the parameters of the act of state doctrine under the antitrust laws, as formulated in *Parker v. Brown*, 317 U.S. 341 (1943), this Court has drawn a sharp line between actions of States and actions of local governments exercising state-derived authority. In *Community Communications Co. v. Boulder*, 455 U.S. 40, 53-54 (1982), the Court explained:

> The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitations: Ours is a "*dual* system of government," *Parker*, 317 U.S. at 351 (emphasis added), which has no pale for sovereign cities. As this Court stated long ago, all sovereign authority "within the geographic limits of the United States" resides either with "the Government of the United States or the States of the Union."

The same principles control here. If the judicial power of the United States can be exercised over counties notwithstanding the express recognition of state sovereignty contained in the Eleventh Amendment, then surely there is nothing in the unstated "postulates" of the Constitution

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[11] *See also Old Colony Trust Co. v. Seattle*, 271 U.S. 426 (1926); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *cf. Moor v. County of Alameda*, 411 U.S. 693 (1973) (unlike States, political subdivisions are "persons" for diversity purposes); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) (political subdivisions are "persons" under 42 U.S.C. § 1983).

to prevent the legislative power from being exercised over these very same bodies.

Simply stated, the fact that the Sheriffs of Ravalli County, Montana and of Graham County, Arizona have been directed to perform certain duties by Congress does not in any respect threaten the state sovereignty of Montana or Arizona.

C. The Brady Act's Requirement That, Until the Federal Government Is Able to Develop a National System, Law Enforcement Officials Must Make a "Reasonable Effort to Investigate" the Lawfulness of Proposed Handgun Sales, Does Not Unconstitutionally Infringe State Sovereignty

Even if, *arguendo*, the Brady Act were addressed to the States, it still would be constitutional. For the conjunction of *FERC* and *New York* teach that not every action by Congress enlisting the States in federal regulation offends core notions of state sovereignty. And, the mandate at issue here is qualitatively different from the mandate that was imposed on the States in *New York* and more like the duties upheld in *FERC*. Accordingly, it is *FERC* and not *New York* that is controlling here.

1. In *FERC*, the Court sustained provisions of a federal law which imposed two discrete duties on "State regulatory authorities": first, a duty to "implement" (by adjudicating cases arising under) rules promulgated by the Federal Energy Regulatory Commission ("FERC"); and second, a duty to "consider" certain federally-proposed approaches to rate regulation.

Relying on *Testa v. Katt*, 330 U.S. 386 (1947), this Court reasoned that "the Federal Government has some power to enlist a branch of state government—there [in *Testa*] the judiciary—to further federal ends." 456 U.S. at 762. And, the *FERC* Court concluded that "enlisting" a state administrative agency to enforce, through adjudica-

tion, federally-promulgated rules and to "consider . . . suggested federal standards" does not "threaten the States' 'separate and independent existence,' and does not impair the ability of the States 'to function effectively in a federal system.' " *Id.* at 765-66, *quoting National League of Cities*, 426 U.S. at 852.

The Low Level Radioactive Waste Policy Amendments Act at issue in *New York*, was of a different character. There, Congress identified a problem—the disposal of low-level radio active waste--but did *not* provide a solution; instead Congress commanded the States to solve the problem. Congress' sole contribution was to impose sanctions on those States which failed to do so in the form of the "take title" provision. As a consequence, the States faced a choice between "regulat[ing] according to one federal instruction" or "submit[ting] to another federal instruction. Either way," the Court reasoned, " 'the Act *commandeers the legislative processes of the States* by directly compelling them to enact and enforce a federal regulatory program.' " 505 U.S. at 176 (emphasis added).

It was this vice—stated in various different ways at various points in the Court's opinion [12]—that led the Court to conclude that Congress had "infring[ed] upon the core of state sovereignty" in a manner "inconsistent with the federal structure of our Government." 505 U.S. at 177. The inconsistency, the Court explained, lay in the fact that "where the Federal Government compels States

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[12] *See* 505 U.S. at 161 (interpreting *Hodel* as resting on the proposition that the law at issue there "did *not* 'commandeer' the States into regulating mining"); *id.* at 162 (interpreting *FERC* as upholding the law challenged there because " '[t]here was nothing . . . 'directly compelling' the States to enact a legislative program"); *id.* ("the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"); *id.* at 166 ("where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts").

to regulate, the accountability of both state and federal officials is diminished." 505 U.S. at 168. The Court elaborated by drawing the following contrast:

> If the citizens of New York . . . do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. [*Id.*]

On the other hand:

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. [*Id.* at 169]

In sum, "[a]ccountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation." *Id.*

2. The Brady Act is quite unlike the statute at issue in *New York*. In enacting the Brady Act, Congress declared it to be the policy of the federal government to bar the sales of handguns to individuals meeting certain criteria. Congress further made it federal policy to establish a five-day waiting period between the time a purchaser applies to purchase a handgun and the time the gun can be sold. Congress took full and complete responsibility for these policy determinations (as several former Members of Congress can attest).

Congress likewise took steps in the Brady Act to assume full responsibility for the administration of the law

by directing the Attorney General to establish a "national instant criminal background check system" which, once operational, will be used during the waiting period to determine whether a sale would be lawful. P.L. 103-159, § 103. The Act authorizes the appropriation of such funds as are needed to implement this section. *Id.* § 103(k). But recognizing that the federal government at present lacks the information needed to pass upon the lawfulness of proposed handgun sales, Congress enacted what the law itself terms an "interim provision," *id.* § 102 (a), which, until the national system is operational, obligates CLEOs to make "a reasonable effort to ascertain" whether the proposed sale would violate the federally-established standards, *id.* § 102(a)(2). This is the sole obligation the Act imposes on CLEOs. And, the Bureau of Alcohol, Tobacco and Firearms has defined the "reasonable effort" required by the Act as, at most, requiring CLEOs to "check commonly available records."[13]

The obligation imposed by the Brady Act thus falls within the category of what one commentator has denominated a "ministerial mandate": Congress has "fully specif[ied] the private rules of behavior Congress wants to impose," and Congress has required only that state administrative officials assist in "implement[ing] those federally

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[13] Bureau of Alcohol, Tobacco and Firearms, Open Letter to State and Local Law Enforcement Officials (January 21, 1994). BATF adds:

> The level of research may justifiably vary among law enforcement agencies. In rural, sparsely populated counties where many handgun purchasers are personally known to the CLEO, little or no research may be necessary in many cases. In densely populated urban areas, every potential buyer might be run through the available computer records to determine whether any disqualifying information is on file. Each law enforcement agency serving as the CLEO will have to set its own standards based on its own circumstances, *i.e.* the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction.

defined rules through relatively ministerial enforcement action." [14] These obligations bear a much closer resemblance to the mandates upheld in *FERC* than to those overturned in *New York*.

Against this background, the ultimate question posed here may be restated as follows: notwithstanding *FERC*, should the rule of *New York*—which by its terms and its theory is limited to cases in which the federal government "commandeers the [state] legislative process by compel-[ling] the States to regulate"—be extended to reach cases, like the instant one, in which a federal command requires state officials (still assuming CLEOs to be officials of the State) to participate in *administering* a federal regulation embodying a clear, explicit and complete set of federal policy judgments? As we proceed to show, such an extension would loose the *New York* rule completely from its moorings.

3. The *New York* Court was of the view that in "opt[ing] for a Constitution in which Congress would exercise its legislative authority directly over individuals," the Framers both vouchsafed Congress the power "to pass laws requiring or prohibiting certain acts" and foreclosed Congress from "compel[ling] the States to require or prohibit those acts." 505 U.S. at 165-66. That reading of the historical materials—and the resulting conclusion that the Constitution forbids federal commands to state legislative bodies—has been seriously questioned.[15] But, be that as it may, at least this much is clear: there is

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[14] Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law*, 95 Colum. L. Rev. 1001, 1011 (1995).

[15] *E.g.*, Caminker, *supra* n.14; Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 Kan. L. Rev. 493 (1995); Redish, *Doing It With Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 Hastings L.Q. 593 (1994).

surely no basis for imputing to the Framers an intent to immunize state officials from being called upon to assist in *administering* federal law.

To the contrary, at the Constitutional Convention, Charles Pinkney (whose speech to the South Carolina House of Representatives on ratification the *New York* Court quoted, 505 U.S. at 165), in defending the proposal to have state legislatures elect the members of the United States Senate, stated that the States "are the instruments upon which the union must frequently depend for the support *and execution* of their powers, however immediately operating upon the people and not upon the States." I M. Farrand, *supra*, at 404 (emphasis added). In *Federalist Paper* No. 27, Hamilton developed this thought further. Responding to the concern that the "people will be disinclined to the exercise of federal authority" and that the national government would therefore require "the aid of a military force to execute its laws," Hamilton wrote:

> The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to *employ the ordinary magistracy of each in the execution of its laws.* It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which they might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State . . . It merits particular attention in this place, that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive and judicial in each State will be bound by the sanctity of an oath. Thus, the legislatures, courts and magistrates, of the respective members will be incorporated into the operation of the

> national government *as far as its just and constitutional authority extends*; and will be *rendered auxiliary to the enforcement of its laws.* [*Federalist Paper* No. 27, pp. 176-77; first and last emphasis added]

Hamilton returned to this point in *Federalist Paper* No. 36, in responding to the concern that the federal tax power would suffer "from the want of a sufficient knewledge of local circumstances." Hamilton replied:

> But there is a simple point of view in which this matter may be placed that must be altogether satisfactory. The national legislature can make use of the *system of each State within that State.* The method of laying and collecting this species of taxes in each State can, in all its parts, be adopted and employed by the federal government. [*Federalist Paper* No. 36, p. 220; emphasis in the original] [16]

What the Framers said before ratification is what they *did* once the Constitution was ratified. As Professor Caminker has shown, numerous early statutes confirm the understanding of the Framers' generation that the States could be enlisted into the service of implementing laws of the new federal government. *See Caminker*, 95 Colum L. Rev. at 1044-45 & nn.170-76. And, while most of these statutes were addressed to judges and judicial personnel, the duties placed upon these persons were executive in nature; the statutes were addressed to the judiciary only because "two centuries ago, state and local judges and associated judicial personnel performed many of the functions today performed by executive officers." *Id.* at 1045 n.176.[17]

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[16] *See also* Madison's comments in *Federalist Paper* No. 45, u. 292 ("it is probable . . . that the eventual collection, under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States").

[17] *See, e.g.*, Act of July 20, 1790, 1 Stat. 131 (justice of the peace "required to issue his precept" and " "shall . . . determine" whether a ship is seaworthy); Act of February 12, 1793, 1 Stat. 302 ("it shall be the duty of the executive authority" to cause

Thus, the constitutional materials on which the *New York* Court relied point in precisely the opposite direction here.

(b) Equally to the point, the constitutional value put at risk by the *New York* statute is not threatened by the federal statute here. As Justice Kennedy wrote in *Lopez*, "[t]he theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability." 115 S.Ct. at 1638 (concurring opinion). And, when Congress "commandeers" the state legislative process—as it did in *New York*—the requirement of "political accountability" is severely threatened, as the *New York* Court was at pains to explain. Pp. 17-18 *supra*.

A "ministerial mandate," like the one at issue here, in contrast, simply does not seriously threaten the "distinct and discernable lines of political accountability." The States are *not* being commanded to regulate—let alone commanded to regulate in a particular fashion. To the contrary, the federal government has, by hypothesis, made all of the relevant policy judgments. It stands fully accountable for those judgments. It seeks the assistance of state officials only to assure that the federal policies are implemented in accordance with the congressional plan.

Indeed, the principal injury to state sovereignty which is claimed here is *not* a shifting of political accountability to the CLEOs but the required expenditure of a limited amount of resources on Brady Act investigations when the CLEOs might otherwise expend that money in another fashion. But the constitutional scheme plainly contemplates that one consequence of being part of this Nation is that some amount of a State's resources may have to be expended in ways that the State might not choose were it a

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fugitives to be arrested and extradited); Act of July 6, 1798, 1 Stat. 577 ("it shall be the duty of the . . . courts . . . of each state," upon complaint against a resident alien, "to cause such . . . aliens to be apprehended").

nation onto itself. If the rule were otherwise, States could not be required to open the doors of their courts or their administrative agencies to federal claims, nor could they be required to abide by generally-applicable federal laws. Put differently, the infringement on state sovereignty claimed here is no different that that which was upheld in *Testa, FERC, Fry* and *Garcia* and is a far cry from the infringement claimed in *New York*.

4. It is not necessary in order to dispose of the instant case to go so far as to hold that a mandate to state officials to assist in the administration of a federal law is *always* constitutionally permissible. Rather, it is enough here to hold that such mandates are not *per se* unconstitutional. For if any such mandate is to be upheld, this is surely the one.

To begin with, the mandate at issue here imposes the most minimal of burdens: it requires only a "reasonable investigation" which BATF has defined in a common-sense way. Pp. 19-20 & n. 13 *supra*. Second, the obligation is imposed on local officials who, even if they can waive the State's sovereignty banner, surely have no title to the banner itself. Third, the obligation is time-limited and exists only for an interim period to enable the federal government to develop a national database. And fourth, the obligation furthers a vitally-important federal regulatory interest—an interest which could not be advanced during this interim period without State involvement.

Given all this, it is enough to conclude here that the Constitution does not create an absolute rule which always bars any ministerial mandate and that, in the instant case, the federal interests so clearly predominate as to permit this mandate.

5. We end where we begin. When this Court undertakes to review the constitutionality of a federal statute, it undertakes its most awesome responsibility. That is, perhaps, especially true when dealing with a law like the

Brady Act, which has been the subject of such intense debate within the political branches for so long.

This Court cannot, of course, escape its duty to declare what the Constitution means. But where, as here, the constitutional claim is based not upon the text of the document but upon "postulates" said to be implied from our federal structure, the Court ought to demand the strongest possible evidence before drawing out its own blueprint for such a structure and making it part of the Constitution. Such evidence is entirely lacking here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

and

SHERIFF RICHARD MACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE COALITION TO STOP GUN VIOLENCE *AND* THE EDUCATIONAL FUND TO END HANDGUN VIOLENCE IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 95-1478, 95-1503

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

and

SHERIFF RICHARD MACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF *AMICUS CURIAE* OF THE COALITION TO STOP GUN VIOLENCE *AND* THE EDUCATIONAL FUND TO END HANDGUN VIOLENCE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

The Coalition to Stop Gun Violence (the Coalition), is a coalition of more than forty religious, professional, labor, medical, educational, and civic organizations

founded in 1974 to combat the epidemic problem of gun violence in the United States. The Coalition's more than 100,000 individual members are dedicated to the goal of eliminating the private sale of handguns and assault weapons in the United States.

The Educational Fund to End Handgun Violence (the Educational Fund), a nonprofit charity founded in 1978, seeks to end firearm violence, particularly as it affects children, through education, litigation, and research. The Educational Fund conducts independent research on firearms violence and collects and analyzes government statistics and studies conducted by others to better understand the serious public health threat presented by firearms violence. The Educational Fund also uses such information to evaluate the impact of proposed measures to combat firearms violence. The information collected by the Educational Fund has proven to be a valuable resource for educators, journalists, attorneys, legislators, and the general public.

The Coalition and the Educational Fund jointly file this brief to give the Court the benefit of their knowledge of, and experience with, the extensive problem of gun violence in the United States.[1]

STATEMENT

"The United States is beset by an epidemic of gun violence." [2] The level of handgun violence in the United

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[1] Both Petitioners and Respondent have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court. Amici do not have any parents or subsidiaries.

[2] H.R. Rep. No. 103-344, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985. ("House Rep.") The House Report accompanying the Brady Act cites the following data:

> 15,377 Americans were murdered with firearms in 1992. 12,489 of these murders were committed with handguns.

States surpasses every developed nation in the world, *see* H.R. Rep. No. 103-344, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985, and the numbers are staggering. During 1993 (the year that the Brady Act was passed) firearms claimed the lives of 39,595 people in the United States. *See* L.A. Fingerhut, C. Jones, D. Makou, "Firearm and motor vehicle injury mortality—Variation by state and race and ethnicity: United States, 1990-1991," *Advance Data from Vital and Health Statistics*, No. 242, National Center for Health Statistics, Hyattsville, MD, 1994. In 1994, 15,456 Americans were murdered with firearms; handguns alone were used to commit 13,483 of these murders. *See* Federal Bureau of Investigation, *Uniform Crime Reports 1994* (1995).

Before the passage of the Brady Act, these already horrifying numbers were increasing at an alarming rate. Between 1985 and 1994 the firearm murder rate rose 45.8 percent; the handgun murder rate increased 65.2 percent. *See id.* Firearm fatalities are projected to surpass automobile fatalities to become the leading cause of injury-related death in the United States by the year 2003. *See* Centers for Disease Control, "Deaths resulting from firearm- and motor-vehicle-related injuries: United States, 1968-1991," *Mortality and Morbidity Weekly Report*, vol. 4, 1994, at 37-42.

> **Gun murders in the United States increased by 41 percent between 1988 and 1992.**
>
> **530,000 Americans were robbed or assaulted by firearm-wielding criminals in 1991.**
>
> **Armed rapists attacked nearly 15,000 women in the United States [in 1992].**
>
> **Two University of California economists have estimated the direct medical cost of firearms injuries at $1.4 billion annually, and the indirect cost of lost productivity at $19 billion annually.**

Id.

Perhaps the greatest tragedy of gun violence is its impact on our nation's children. In 1991, 5,356 children were killed by handguns. *See* L.A. Fingerhut, C. Jones, D. Makou, "Firearm and motor vehicle injury mortality—Variation by state and race and ethnicity: United States, 1990-1991," *Advance Data From Vital and Health Statistics,* No. 242, National Center for Health Statistics, Hyattsville, MD, 1994. An alarming number of young people are in possession of guns. In 1992, over 54,000 juveniles were arrested for weapons violations. *See* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Juvenile Offenders and Victims: A National Report,* Washington, D.C. (1992) at 100. A 1990 survey found that 1 in 20 high school students had carried a gun in the past month. *See id.* at 52. When students are more concerned about their safety than their homework, the effectiveness of our schools is compromised. *See United States v. Lopez,* 115 S. Ct. 1624, 1659 (1995) (Breyer, J., dissenting).

The vast majority of the American public views the ready availability of guns as the root cause of this epidemic. *See* Louis Harris, "A Survey of the American People on Guns as a Children's Health Issue," A Study Conducted by L.H. Research, Inc. for The Harvard School of Public Health, June 1993, at 14. According to the Bureau of Alcohol, Tobacco and Firearms (ATF), there were over 211,000,000 privately-owned firearms in the United States in 1991—approximately one gun for each adult and half the children in America. *See* Bureau of Alcohol, Tobacco and Firearms, "How Many Guns?" *ATF News Release* FY-91-36, G.P.O., Washington, 1991; U.S. Department of Commerce, Bureau of the Census. It is fair to say that gun violence is one of the nation's most pressing social problems.

Congress enacted the Brady Handgun Violence Prevention Act to address this problem. Although federal

law has barred convicted felons, illegal drug users, fugitives from justice, and others from purchasing guns from federally licensed firearms dealers since 1968. Congress found that "it is clear from the number of crimes committed with firearms that criminals have relatively easy access to guns." House Rep. at 1986.

The Brady Act establishes national procedures to identify prospective gun purchasers who are prohibited by federal, state, or local laws from buying handguns by amending the Gun Control Act of 1968 to require the Attorney General to establish a national instant criminal background check system by November 30, 1998. *See* 18 U.S.C. § 922. Once this system is operational, gun dealers are required to consult it before transferring a firearm to verify that the prospective gun purchaser is eligible to buy a handgun.

Because this instant check system may not be in place until late 1998, the only practical way to address the epidemic of gun violence in the very near term is by enlisting the help of the States. Congress therefore enacted temporary interim provisions obliging state law enforcement officers to conduct the background checks. These interim provisions impose a five-day waiting period and subject purchasers to a background check during that period.[3] Firearms dealers must obtain from prospective purchasers a statement of personal information by requiring them to fill out a form prepared by ATF, the agency responsible for administering the Brady Act's interim provisions. Dealers must then transmit that form to the "chief law enforcement officer" (CLEO) of the prospective purchaser's residence.

Once a CLEO has received the information from the dealer, that official "shall make a reasonable effort to ascer-

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[3] The waiting period and background check are not required in States that have adopted permit systems meeting the standards in the Act. *See* 18 U.S.C. § 922(s)(1)(C), (D).

tain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. § 922(s)(2). If the CLEO determines that a transfer is lawful, the transferee's statement and records must be destroyed. *Id.* § 922(s)(6)(B)(i). If the CLEO determines that a transfer is illegal, the CLEO must give a written explanation if requested to do so by the prospective transferee. *Id.* § 922(s)(6)(C).

The Brady Act's interim background check provisions are working to prevent criminals and others from obtaining easy access to handguns. Since its passage, the Brady Act has prevented more than 102,800 prohibited purchasers (including over 72,300 felons—over 85 felons per day) from taking possession of a handgun. *See Denying Handguns to Prohibited Purchasers: Quantifying the Impact of the Brady Law*, Center to Prevent Handgun Violence, August 26, 1996.

SUMMARY OF ARGUMENT

1. Under established Tenth Amendment principles, the interim measures adopted by Congress in the Brady Act must be upheld. It is settled law that the federal government may direct state officers to take specific actions, and that when Congress chooses to do so, the political safeguards of federalism will protect the states from federal overreaching.

Although, in *New York v. United States*, 112 S. Ct. 2408 (1992), the Court held that it would not rely upon these safeguards to protect states' autonomy when Congress compels state legislatures to enact a federal regulatory program under the guise of state law, the Brady Act clearly does not commandeer state legislative processes. While the Brady Act does require state officers to perform minimal duties for a temporary period of time,

the statute does not implicate the same concerns underlying the decision in *New York*. Where Congress does not compel the states to legislate, but only imposes minor obligations on state officials, there is little risk that the political accountability of either the state or the federal government will be undermined.

That compliance with the Brady Act may affect a state's resource allocation decisions is no reason to find the Act unconstitutional. In a long line of cases, the Court has upheld statutes requiring states to comply with generally applicable laws without regard to the effect of those laws on the states' ability to decide how to allocate their resources.

2. Even if the minimal obligations imposed on state officers by the Brady Act raise some of the concerns underlying the exception created in *New York*, the Act must be upheld because the compelling federal interest in immediately addressing the national epidemic of handgun violence greatly outweighs the minimal burden placed on the states. Gun violence is one of the most pressing social problems in America today. The temporary duty to make a "reasonable effort" to conduct background checks, to destroy records, and to explain denials pales in comparison.

3. If any of the interim provisions are unconstitutional, they are severable from the remainder of the Brady Act. Congress has unambiguously expressed its intent that the validity of the Act not depend on the validity of any individual provision, and it is clear that the remaining provisions will be fully operative and will function in a manner consistent with the intent of Congress.

ARGUMENT

I. THE TEMPORARY BACKGROUND CHECK, RECORD DESTRUCTION, AND EXPLANATION PROVISIONS OF THE BRADY ACT ARE NOT AN UNCONSTITUTIONAL INTRUSION UPON STATE SOVEREIGNTY.

The federal government's authority to direct state officers to take or refrain from taking certain actions is well established. The Court has repudiated the notion that Congress " 'has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.' " *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (quoting *Kentucky v. Dennison*, 24 How. 66, 107, 15 L. Ed. 717 (1861)). Congress may subject States to generally applicable laws and thereby impose federal duties upon state executive officers to, for example, comply with federal wage and overtime standards in the execution of state functions. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985); *Fry v. United States*, 421 U.S. 542, 548 (1975).

Congress may also impose specific duties on state officials in the performance of their official roles. In *FERC v. Mississippi*, the Court upheld a statute which compelled State regulators to hold a public hearing to consider adopting federal standards, to issue a written opinion if the federal standards were not adopted, and to submit annual reports respecting their consideration of those standards. *See* 456 U.S. at 759-60. Although the statute at issue in *FERC* imposed direct federal obligations on state officers, it was upheld because "there is nothing in [the statute] 'directly compelling' the States to enact a legislative program." *FERC*, 456 U.S. at 765.

The imposition of such obligations poses no serious threat to state sovereignty because, as a general matter, the political safeguards of federalism will protect States from federal overreaching. *See Garcia*, 469 U.S. at 552

("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.") However, as *FERC* recognized, where Congress compels a state legislature to enact as state law a federal regulatory program, these safeguards may be inadequate because members of Congress may have competing incentives to shield themselves from the electorate's anger over unpopular programs.

It was precisely this circumstance—federal usurpation of state legislative processes—that led the Court in *New York v. United States* to hold the Low Level Radioactive Waste Policy Act unconstitutional. *New York* involved an attempt by Congress to foist the responsibility for addressing the politically charged problem of disposing of low-level radioactive waste on the States by requiring State legislatures to enact as state law a federal regulatory program or, alternatively, to accept ownership of and assume liability for the waste within their borders (which previously would have been in private hands). The State legislature thus was forced to regulate the disposal of low-level radioactive waste—either by enacting a federal policy dictating how private owners must dispose of it or by accepting ownership of the waste, which necessarily means assuming the responsibility for deciding how to dispose of it.

The statute in *New York* was unconstitutional because it " 'commandeer[ed] the legislative processes of the States' " by compelling them to adopt, as state regulation, a federal regulatory program. 112 S. Ct. at 2420 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). Such an action, of course, intrudes upon the very core of state sovereignty. Critically, "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *New York*, 112 S. Ct. at 2424. Because the legislation ultimately enacted is state legisla-

tion, it will "be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* When Congress devises a regulatory program, but state legislatures must enact it in the guise of state legislation, the political safeguards of federalism fail to adequately protect state autonomy.

Under these principles, the challenged provisions of the Brady Act must be upheld. The Brady Act does not commandeer the *legislative processes* of the States, but merely enlists state officers to help enforce a federal program for a temporary period of time. Because it is not the kind of federal mandate prohibited by *New York*, there is no reason to believe that the procedural safeguards of federalism failed to operate effectively. In fact, the inclusion in the statute of a $200 million state grant program indicates that the States' interests were well represented in Congress. *See* Brady Handgun Violence Prevention Act, P.L. 103-159 § 106(b) (1993).[4]

Although the Brady Act enlists state officers to help enforce a federal program by performing minimal duties on an interim basis, the Act does not pose anything like the threat to state sovereignty posed by the statute invalidated in *New York*. The Brady Act was enacted to require gun dealers to conduct background checks before

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[4] The political safeguards of federalism identified in *Garcia* do not operate only to protect states from generally applicable laws. *Garcia* did not rely on similarly-situated private interests to protect States' interests. To the contrary, there was a suggestion in *Garcia* that the fact that the FLSA was a law of general applicability might prevent States' interests from being adequately protected in Congress. The Court rejected that suggestion, stating that "[t]he fact that some federal statutes such as the FLSA extend general obligations to the States cannot obscure the exent to which the political position of the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause." *Garcia*, 469 U.S. at 553-54.

selling a handgun; the Act is therefore ultimately a statute aimed at individuals. It is only because of the time required to establish a national instant check system and the immediacy of the problem of gun violence that Congress was compelled to enlist temporarily the help of the states.

In contrast to an effort to commandeer a state's legislative process, federal reliance on state enforcement officers to vindicate aspects of federal policy is entirely consistent with the original constitutional plan. Madison noted that collection of tax revenue for national purposes "will generally be made by the officers . . . appointed by the several States." *The Federalist* No. 45, at 237 (James Madison) (J.M. Dent & Sons Ltd., 1961). Hamilton concurred: "The national legislature can make use of the *system of each State within that State.* The method of laying and collecting taxes in each State can, in all its parts, be adopted and employed by the federal government." *The Federalist* No. 36, at 172 (Alexander Hamilton) (emphasis in original).

Petitioners nevertheless argue that the Brady Act must be struck down under *New York* because it requires States to administer a federal regulatory scheme. Petitioner Printz, defining "administer" as "to execute law or 'to discharge the duties of an office,' " Printz Br. at 23 (quoting *Black's Law Dictionary* 65 (1968)), argues that the Brady Act falls within the rule announced in *New York*. *See New York*, 112 S. Ct. at 2435 (Congress may not require states to "enact or administer" a federal program). If Printz were correct, the federal government would never be able to impose upon a state official any duty, regardless of its nature or extent. However, as discussed above, the Court has rejected the interpretation of the Tenth Amendment that would prohibit the federal government from " 'impos[ing] on a State officer, as such, any duty whatever, and compel[ling] him to perform it.' " *FERC*, 456 U.S. at 761 (quoting *Kentucky v. Dennison*, 24 How. 66, 107, 15 L. Ed. 717 (1861)). At a mini-

mum, Printz's reading of *New York* would require the conclusion that *FERC* be overruled. *New York* did not do so. It would be particularly inappropriate to read it as overruling *FERC* sub silentio because the "administer" language on which Printz relies was pure *dictum*—the case having involved federal commandeering of the legislative process.

Petitioner Mack contends that the *New York* exception should apply where Congress affects "State decisions regarding the use of its own resources." Mack Br. at 28. This contention is equally inconsistent with settled Tenth Amendment jurisprudence, and must be rejected. As the Court stated in *FERC*, squarely rejecting the argument that the statute in that case was unconstitutional because compliance with its requirements would impose financial burdens, "in a Tenth Amendment challenge to congressional activity, 'the determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States.' " *FERC*, 456 U.S. at 770, n. 33 (quoting *Hodel*, 452 U.S. at 292, n.33).

In addition, a long line of cases have held that Congress may subject state governments to generally applicable laws, even though compliance with those laws may constrain a state's ability to allocate its own resources. Surely compliance with the federal minimum wage and overtime provisions of the Fair Labor Standards Act upheld in *Garcia* affected state resource allocation decisions and constrained States' ability to set priorities even more than the minimal burdens imposed by the Brady Act. As Justice Powell noted in his dissent in *Garcia*, "[t]he financial impact on States and localities of displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes." 469 U.S. at 578 (Powell, J., dissenting).[5]

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[5] Although petitioners seek to distinguish cases concerning generally applicable laws, this diminution of state authority and con-

Most importantly, the Brady Act does not undermine political accountability in the way that the statute at issue in *New York* did. Because the Act does not require the States to enact legislation or set policy, there is no material risk that accountability will be shifted from Congress to the States. There is also little danger that individuals will be confused about the locus of the responsibility for the background checks—the federal Bureau of Alcohol, Tobacco and Firearms is to administer the interim provisions and the form to be filled out by potential transferees is clearly a federal form. *See* 27 C.F.R. § 178.102(a)(1). Although state law enforcement officers are to implement the law for a temporary period of time, voters know that it is the legislature that passes the law, not the officers who enforce the law, that must be held accountable.

II. THE BRADY ACT DOES NOT CONTRAVENE THE TENTH AMENDMENT BECAUSE THE FEDERAL INTEREST IN REDUCING THE INCIDENCE OF HANDGUN VIOLENCE GREATLY OUTWEIGHS THE BURDEN PLACED ON STATES' AUTONOMY.

Even if the minimal obligations imposed on state officers by the Brady Act raise some of the concerns underlying the "no legislative commandeering" rule of *New York*, the Act must be upheld because the compelling federal interest in immediately addressing the epidemic of handgun violence greatly outweighs the minimal and temporary obligations placed on the states. *See EEOC v. Wyoming*, 460 U.S. 226, 42, n.17 (1983); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 684,

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trol over its allocation of resources was not any less because the Act applied to private parties as well as to states.

[6] In *New York*, the Court recognized that it has stated that it would "evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign" but declined to consider the argument in that case because, "[n]o matter how powerful the federal interest in-

n.9 (1982).[6] "There are situations in which the nature of the federal interest advanced may be such that it justifies state submission," *Hodel*, 452 U.S. at 288, n.29. In *FERC*, for example, the Court upheld a directive aimed solely at state officials, stating that it did not place "any particularly onerous burden on the State." 456 U.S. at 768.

The federal interest in preventing known criminals and other ineligible people from illegally obtaining handguns is of the highest order. As described above, the level of gun violence is one of the nation's most pressing social problems. Congress, and the overwhelming majority of the American people, view the sheer number of guns in the United States and their ready availability as one of the main causes of this national epidemic. Congress saw an urgent need to reduce the level of gun violence by making it more difficult for individuals to unlawfully obtain handguns, and believed that the only practical way to do so immediately was by enlisting temporarily the help of state law enforcement officers.

Contrasted to this urgent need, the duties imposed upon state officials by the Brady Act are insignificant. First, the obligations are temporary; CLEOs are required to conduct background checks only until the national instant check system becomes operational. Second, the Act requires CLEOs to make only a "reasonable effort" to determine whether the prospective purchaser may lawfully obtain a gun, and CLEOs need to check state and local records only if these records are "available." 18 U.S.C. § 922(s)(2). In an open letter interpreting this provision of the Act, ATF explained that, while the Act "anticipates some minimal effort to check commonly avail-

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volved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York*, 112 S. Ct. at 2429. Although the Court rejected the assertion that "such a federal interest would enable Congress to command a state government to enact state regulation," *id.* (emphasis omitted), the Brady Act clearly does not command the states to enact regulation.

able records," CLEOs are not required to check "every conceivable record system that may contain information relating to categories of prohibited persons" and in some circumstances, it may be reasonable for a CLEO to do little or no research. Appendix to Brief for United States on Petition for Writ of Certiorari in *Printz v. United States* at 13a-14a.

In addition, state autonomy is preserved because it is the CLEOs who decide what constitutes a "reasonable effort." As the open letter explains, each "CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." *Id.* at 14a-15a.

Although petitioners seek to characterize the duties imposed by the Brady Act as burdensome, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *New York*, 112 S. Ct. at 2425 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Because a construction of the Act as imposing only a temporary, de minimis burden on the states is consistent with the statutory language and with the interpretation of the Act given by the agency responsible for its administration, the Court also should construe the background check requirements as imposing only a slight burden on the states. This minimal, temporary burden is heavily outweighed by the compelling federal interest in curbing immediately the pressing problem of gun violence. The interim provisions of the Brady Act thus should be upheld.

III. THE INTERIM BACKGROUND CHECK, RECORDS DESTRUCTION, AND EXPLANATION PROVISIONS ARE SEVERABLE FROM THE REMAINDER OF THE BRADY ACT.

Should this Court find any of the interim provisions of the Act unconstitutional, those provisions are severable from each other and from the remainder of the Brady Act. " '[A] court should refrain from invalidating more of the statute than is necessary. . . . [W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.' " *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)). " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *New York*, 112 S. Ct. at 2434 (quoting *Alaska Airlines*, 480 U.S. at 684).

Where a statute contains a severability clause, the inquiry into Congressional intent is eased, because "the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686. The Gun Control Act of 1968, of which the Brady Act is a part, contains such a severability clause. This clause, which states that "if any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby," 18 U.S.C. § 928, unambiguously demonstrates Congress'

intent that the validity of the Brady Act not depend on the validity of any individual provision.[7]

Even absent the severability clause, it is clear that Congress intended the unchallenged provisions of the Brady Act's interim provisions—the five day waiting period, the requirement that gun dealers obtain a statement of personal information from prospective transferees and notify CLEOs of that statement, and the power given to CLEOs to veto a handgun transfer—to survive in the absence of the background check, records destruction, and explanation requirements.

Congress would have intended a provision to be severed if the remaining legislation is not "incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684. It is clear that without the background check, records destruction, and explanation requirements, the remainder of the Brady Act's interim provisions will be fully operative. A prospective handgun purchaser will be required to wait five days before obtaining a gun, gun dealers will be required to obtain a statement of personal information from prospective transferees and to give the statement to the CLEO, and CLEOs will have the power to veto a handgun transfer if they choose to do a back-

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[7] Although the Court in *Alaska Airlines* expressed doubt in that case about whether the severability clause contained in the pre-existing Federal Aviation Act applied to the severability of a provision in the later Airline Deregulation Act establishing the Employee Protection Program because that later provision "does not amend provisions of the Aviation Act or any other pre-existing statute, but instead establishes a new program," 480 U.S. at 686, n.8, the Brady Act clearly amends the pre-existing Gun Control Act of 1968. Unlike the statute at issue in *Alaska Airlines*, which expressly stated that the provision at issue "was enacted as part of the Airline Deregulation Act of 1978 and not as part of the Federal Aviation Act of 1958," *see id.*, the Brady Act clearly states that § 102(a), which establishes the interim provisions, "amend[s]" § 922 of the existing Gun Control Act of 1968. Brady Handgun Violence Prevention Act, § 102(a)(1).

ground check and if that check reveals that the prospective transferee is ineligible.

The remainder of the Brady Act will continue to "function in a manner consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685. Petitioners disagree, but all they can demonstrate is that Congress preferred the Act in the form in which it was ultimately enacted. Their citations to legislative history demonstrating that Congress intended the background check to be mandatory, not optional, are irrelevant. As the Court has recently explained, when Congress enacts a statute containing A and B, "taking away A from (A+B) will invariably clearly undermine the legislative purpose to enact (A+B). But the fallacy in applying this reasoning to the severability question is that it is not the severing that will take away A from (A+B) and thus foil the legislature's intent; it is the invalidation of A . . . which does so—an invalidation that occurs whether or not the two provisions are severed." *Leavitt v. Jane L.*, 116 S. Ct. 2068, 2071 (1996) (applying Utah state law).

Petitioners' arguments that the mandatory background check provision cannot be severed from the five-day waiting period because doing so would somehow transform the five days from an optional to a mandatory waiting period are fundamentally flawed because the five-day waiting period *was never optional*. If a CLEO *chose* to do a background check quickly and to notify the gun dealer before the expiration of the five-day period that the prospective purchaser was eligible, the transfer could occur earlier. Otherwise, the purchaser would have to wait five days. In the absence of a mandatory background check, the waiting period functions in an identical manner. If a CLEO *chooses* to do a background check, even though it is no longer mandatory, and notifies the dealer in less than five days that the purchaser is eligible, the transfer may occur before the expiration of the waiting period. Otherwise, the purchaser must wait five days.

Petitioners' claims that the requirements that CLEOs destroy records and provide written reasons for denials are not severable from the rest of the Act are similarly without merit. In the absence of these provisions, gun dealers may continue to obtain personal statements from prospective purchasers and transfer them to CLEOs who may choose to conduct a background check, destroy the records, and provide written explanations for denials. Petitioners' fears that in the absence of a destruction requirement records will be used to register gun owners and that CLEOs will arbitrarily block lawful transfers unless required to provide written explanations are unfounded and insufficient to contradict the clearly expressed intent of Congress that "if any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 18 U.S.C. § 928.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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United States Court of Appeals
for the Ninth Circuit

BRIEF OF HANDGUN CONTROL, INC., CENTER TO PREVENT HANDGUN VIOLENCE, THE UNITED STATES CONFERENCE OF MAYORS, FEDERAL LAW ENFORCEMENT OFFICERS' ASSOCIATION, FRATERNAL ORDER OF POLICE, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, MAJOR CITIES CHIEFS, NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES, NATIONAL TROOPERS' COALITION, AND POLICE EXECUTIVE RESEARCH FORUM AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

In executing its power to regulate commerce, may Congress impose ministerial duties on state officials?

If so, does Congress have the authority to enact the portion of the Brady Act that requires local law enforcement officers, on an interim basis, to make a reasonable effort to review records relating to prospective handgun purchasers?

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The *amici* submitting this brief consist of eight national law enforcement organizations and the U.S. Conference of Mayors, together with Handgun Control, Inc. and the Center to Prevent Handgun Violence, sister organizations chaired by Sarah Brady. The law enforcement *amici* represent hundreds of thousands of law enforcement officers who face the daily threat of handgun violence and who rely upon the Brady Act in the ongoing war against violent crime. The membership of the law enforcement *amici* includes police executives who are subject to the Brady Act requirement that they conduct reasonable background checks on handgun buyers. The U.S. Conference of Mayors represents municipal governments serving populations of 30,000 and more. The members of the Conference are concerned with promoting both public safety and an appropriate distribution of local, state and federal authority. All of the *amici* are committed to preventing handgun violence and to keeping violent criminals and other prohibited persons from purchasing handguns.

STATEMENT OF THE CASE

The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (hereinafter "Brady Act" or "the Act"), was enacted amidst "an epidemic of gun violence." *See* H.R. Rep. No. 103-344, at 8 (1993), *reprinted* in 1993 U.S.C.C.A.N. 1984, 1985. The Act's legislative history recounts the following chilling statistics: 15,377 Americans were murdered with firearms in 1992; 12,489 of these murders were committed with handguns; and handgun murders in the United States increased by 41 percent between 1988 and 1992. *Id.* In 1993, handguns were used to commit 881,000 violent crimes. Craig A. Perkins et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimization in the United States, 1993*, at 72 (1996).

The retail market makes handguns widely available. Federally licensed firearms dealers sell an estimated 3.5

million handguns each year.[1] Since 1968, federal law has prohibited these dealers from selling handguns to convicted felons and other prohibited purchasers. 18 U.S.C. § 922(d). Before enactment of the Brady Act, however, compliance with this prohibition depended on an honor system. The buyer completed a federal form on which he swore under penalty of perjury that he was not a convicted felon nor a member of any other prohibited class. But unless a state or local law required that a background check be performed, no one confirmed that the buyer was telling the truth. As a result, a convicted murderer or rapist willing to lie about his criminal history could easily and immediately purchase a deadly handgun.

The Brady Act "give[s] the law enforcement community a very valuable and effective tool" to cut off criminals and other dangerous persons from the retail market.[2] The Act's interim provisions—the subject of petitioners' challenge—require that the "chief law enforcement officer" ("CLEO") in each jurisdiction "make a reasonable effort to ascertain . . . whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law." 18 U.S.C. § 922(s)(2).[3] This requirement reflects Congress' considered and reasonable judgment that, during the interim period, the CLEOs' access to state records and personal knowledge of their communities make them "best able to determine if the individual is disquali-

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[1] Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of the Treasury, "Guns for Sale In U.S.," ATF Facts 2 (Nov. 1994); *see also* Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of the Treasury, *One-Year Progress Report: Brady Handgun Violence Prevention Act* 2 (1995).

[2] *Brady Handgun Violence Prevention Act: Hearing on H.R. 1025 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. 196 (1993) (statement of Tim Mullaney, Commander, Criminal Investigations Unit, Dover Del., and Member, Fraternal Order of Police) (hereinafter "Hearing on H.R. 1025"); *see also* H.R. Rep. No. 103-344, at 9.

[3] The Act defines "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. § 922(s)(8).

fied to own a handgun."[4] The Act provides CLEOs with the information and time necessary for the check by requiring that a prospective purchaser complete a federal form, that the firearms dealer forward the form to the designated CLEO, and that there be a five business day waiting period. 18 U.S.C. § 922(s)(1)(A).

A handgun purchase may go forward if the CLEO notifies the dealer that a check has indicated that the prospective purchase would be legal, or if the five business day waiting period lapses without the CLEO providing notice that the purchase would be illegal. *See* 18 U.S.C. § 922 (s)(1)(A)(ii)(I) and (II). Conversely, if the CLEO concludes that the sale to the prospective purchaser would be illegal and so informs the dealer within five days, the dealer will not complete the sale. A person whose purchase has been blocked may request that the CLEO provide a written explanation for the determination. 18 U.S.C. § 922(s)(7).

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[4] H.R. Rep. No. 101-691, at 11 (1990); *see also id.* at 10 (CLEOs' specialized knowledge is central to the interim provisions of the statute); Letter from Attorney General Reno to Rep. Charles Schumer (Nov. 9, 1993) ("Background checks performed by local police remain the most effective means of screening out ineligible handgun buyers. It is local law enforcement who best know the residents and residences within their communities."); *Waiting Period Before the Sale, Delivery or Transfer of a Handgun: Hearings on H.R. 975 and H.R. 155 Before the Subcomm. on Crime of the Comm. on the Judiciary*, 100th Cong. 356 (1987 & 1988) (testimony of Dewey Stokes, Nat'l Pres., Fraternal Order of Police, Columbus, Ohio) (hereinafter "Hearings on H.R. 975 and H.R. 155").

Many state criminal history records were either insufficiently computerized or otherwise unavailable to the Federal Government: "only 21 States now share their [criminal history] data with the FBI," and "several States do not even have their records on computer." 137 Cong. Rec. S8945-46 (daily ed. June 27, 1991) (statement of Sen. Mitchell); *see also Hearing on H.R. 1025*, at 89 (testimony of Asst. Attorney General Acheson) ("[L]ocal law enforcement has the advantage, which the FBI does not, of in many instances having physical records . . . .").

Under the Act's permanent provisions, the waiting period will be replaced, on or before November 30, 1998, by a national instant criminal background check to be developed and maintained by the United States Department of Justice. Brady Act § 103(b). This national system will consist of a computerized database that firearms dealers must contact to determine if a handgun purchase would violate the law. *Id.* The Act authorizes $200,000,000 in grants to assist States in the computerization of their criminal records as part of the implementation of the national instant check system. Brady Act § 106(b). By the close of the interim period, CLEOs will have no responsibilities under the Act. 18 U.S.C. § 922(t).

The Brady Act has succeeded in helping to prevent felons and other dangerous persons from obtaining handguns through the retail market. A recent study concludes that the Brady Act's background check requirement has prevented over 100,000 prohibited purchasers, including over 72,000 felons, from obtaining handguns from federally licensed dealers.[5] As the study notes, these numbers understate the Act's effect, as the threat of a background check deters many prohibited purchasers from even attempting to make a retail handgun purchase.

SUMMARY OF THE ARGUMENT

The Brady Act is a valid exercise of the powers granted Congress by the Commerce Clause. The Court "has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers," *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), and thus has upheld legislation even if it "in effect directed state decisionmakers to take or to refrain from taking certain actions." *FERC v. Mississippi*,

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[5] *See* Douglas S. Weil, Center to Prevent Handgun Violence, *Denying Handguns to Prohibited Purchasers: Quantifying the Impact of the Brady Law* 6 (Aug. 16, 1996); *see also* Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of the Treasury, *One-Year Progress Report: Brady Handgun Violence Prevention Act* (1995).

456 U.S. 742, 762 (1982) (collecting cases). The Court will strike down only those federal enactments that: (1) breach the "etiquette of federalism" by commandeering the state legislature or by overburdening state officials, *see United States v. Lopez*, 115 S. Ct. 1624, 1639 (1995) (Kennedy, J., concurring); or (2) cause a breakdown in the political process by preventing political accountability. *See New York v. United States*, 505 U.S. 144, 168-69 (1992).

The Brady Act does not violate the etiquette of federalism. Unlike the statute at issue in *New York*, the Act does not commandeer the States' legislative or regulatory processes. Instead, the Act merely imposes limited, ministerial duties on state officials. Petitioners' view that such minimal burdens violate the Tenth Amendment is "fundamentally incompatible with more than a century of constitutional development." *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987), overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860). The Court historically has upheld federal statutes that imposed duties on state officials.

The Brady Act also does not cause a breakdown in the political process by preventing political accountability. Unlike *New York*, this is not a case where the Federal Government has obscured its role by requiring intermediate state legislation. Instead, citizens are governed directly by federal law. The Act directly requires that prospective handgun purchasers fill out a federal form, and it is the Brady Act alone that makes them wait for a maximum of five business days while their background is checked. Moreover, the Act has been one of the most well-publicized federal enactments in recent history. Because federal officials have not "remained insulated from the electoral ramifications of their decision," *New York*, 505 U.S. at 169, there is no need for this Court to intervene to protect the political process.

The Brady Act is also consistent with the Framers' vision of federal-state relations. As Alexander Hamilton explained, the federal government "must itself be empowered to employ the arm of the ordinary magistrate to

execute its own resolutions." *The Federalist No. 16*, at 165 (Hamilton) (Benjamin Fletcher Wright ed., 1961). The Framers anticipated federal use of state officials, and early Congresses—including the Congress that adopted the Tenth Amendment—passed legislation that imposed ministerial duties on state officials.

If this Court, nevertheless, strikes down a portion of the Brady Act, it should find that the remaining portions are severable. Even if background checks are no longer mandatory, the remaining provisions of the Act would provide law enforcement with the oportunity to perform background checks. The law enforcement community, including members of the *amici* organizations, would readily make use of such an opportunity. Petitioners have not met, and cannot meet, their burden of demonstrating that a Congress concerned with an "epidemic of handgun violence" would have preferred no checks to voluntary ones.

ARGUMENT

I. THE BRADY ACT IS FULLY CONSISTENT WITH THE PRINCIPLES OF FEDERALISM EMBODIED IN THE CONSTITUTION.

The Brady Act's imposition of minimal duties on state officials does not violate constitutional principles of federalism. Petitioners' extreme view of those principles would undermine Congress' Commerce Clause powers and embroil the courts in regulating the complex interactions between federal and state governments.[6] In contrast,

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[6] Congress is granted plenary power under the Commerce Clause to regulate interstate commerce. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824); *see also Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 276 (1981) ("Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress."). Federal legislation directly regulating the sale of handguns easily falls within the scope of that power. *Mack v. United States*, 66 F.3d 1025, 1028 (9th Cir. 1995). The Brady Act is a necessary and proper exercise of Congress' Commerce Clause power. *See* U.S. Const. art. I, § 8, cl. 18; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415, 421 (1819); *supra* at 2-3 and *infra* at 18 (describing Congress' reasons for using CLEOs during the interim period).

this Court "has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers." *Gregory*, 501 U.S. at 464; *cf. United States v. Lopez*, 115 S. Ct. 1624, 1639 (1995) (Kennedy, J., concurring) ("Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.").[7]

Consistent with the scope of congressional power and the role of the political process, "the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." *FERC*, 456 U.S. at 762. The Court will strike down a federal enactment only if it: (1) violates the etiquette of federalism by commandeering the state legislature or overburdening state officials; or (2) causes a breakdown in the political process by preventing political accountability.[8] The Brady Act's limited and narrowly tailored imposition of ministerial duties on state officials implicates neither of these concerns. The Act instead is a valid product of the political and legislative process.[9]

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[7] As a result, the Court has sustained a Tenth Amendment challege to a congressional exercise of the Commerce Clause power only twice since the demise of the *Lochner* era—and the Court subsequently overruled one of those two cases. *See New York*, 505 U.S. 144; *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

[8] Of course, a federal statute that was itself a product of a breakdown in the political process also would be unconstitutional. *See South Carolina v. Baker*, 485 U.S. 505, 513 (1988) ("Although Garcia left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, ... [w]here, as here, the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.").

[9] Petitioners assert no claim that the Brady Act violates the Second Amendment to the Constitution, nor could they. In *United States v. Miller*, 307 U.S. 174, 178 (1939), this Court determined that the Second Amendment guarantee was made "[w]ith obvious purpose to assure the continuation and render possible the effectiveness" of state militias and "must be interpreted and applied with

A. The Brady Act Is Consistent With the Etiquette of Federalism Because It Does Not Commandeer State Legislatures Nor Overburden State Officials.

The "etiquette of federalism" requires that the national government respect the federal structure of our constitutional system. *Lopez*, 115 S. Ct. at 1642 (Kennedy, J., concurring). Such etiquette is the embodiment of important norms through both formal rules and a nuanced analysis of appropriate burdens. The rules of the etiquette of federalism simply forbid "a formal command from the National Government directing the State to enact a certain policy, or to organize its governmental functions in a certain way." *Id.* (citations omitted). The reason for this rule against federal commandeering of state policy-making was set forth by this Court in *FERC*:

> [H]aving the power to make decisions and to set policy is what gives the State its sovereign nature. It would follow that the ability of a state legislative (or, as here, administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system.

456 U.S. at 761 (citations omitted). Federal statutes that force a State to take action as a sovereign "endanger the 'separate and independent existence' " of States within the constitutional system, *United Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678, 690 (1982) (citation omitted), and so violate the Tenth Amendment. *See*

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that end in view." *Accord Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (finding that legislative restrictions on firearms issues do not "trench upon any constitutionally protected liberties" and quoting *Miller* for the proposition that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.' " (citation omitted)); *see also Burton v. Sills*, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969). In no conceivable way does the Brady Act affect the bearing of arms by a state militia. *Cf. Perpich v. Department of Defense*, 496 U.S. 334, 348 (1990) (noting equivalence between the National Guard and the militia).

New York, 505 U.S. 144; *Coyle v. Smith*, 221 U.S. 559 (1911).

The legislative scheme under review in *New York* [10] did not respect the federal structure established by the Constitution because it would "require the States to govern according to Congress' instructions," 505 U.S. at 162, "command state legislatures to legislate," *id.* at 179, "'commandeer[] the legislative processes,'" *id.* at 176 (quoting *Hodel*, 452 U.S. at 288), and "command a state government to enact *state* regulation," *id.* at 178. Such commandeering of state legislatures is inimical to the etiquette of federalism established by the Framers, who explicitly rejected a system in which the Federal Government would act through "'intermediate legislations'" passed by the States. *Id.* at 163-66 (quoting *The Federalist No. 16*, at 165 (Hamilton)).[11]

The Brady Act does not violate the etiquette of federalism. It does not "command state legislatures to legislate"

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[10] The Court's opinion in *New York* focused, in relevant part, on the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPA"). Under that provision, a State was required to either (1) regulate radioactive waste according to a federal formula or, (2) take title of all waste generated within its borders, which inevitably would require that the State develop a legislative or regulatory program to deal with disposal of the waste. *See New York*, 505 U.S. at 175. The Court held that both alternatives were unconstitutional, because either way, 'the Act commandeers the *legislative processes* of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288 (emphasis added)).

[11] Petitioners' erroneously broad reading of *New York* is based principally on the Court's use of the term "administer" at two points in its opinion. *See, e.g.*, Printz Brief at 16, 23; Mack Brief at 28. The decision as a whole, as well as the particular contexts in which the term was used, belie Petitioners' broad interpretation. *New York* was concerned with a federal directive to the States to enact legislation or develop a regulatory program to address the disposal of radioactive waste. In context, "administer" describes the creation of state policy by an administrative agency—not the ministerial implementation of a federal program. *See* 505 U.S. at 176-77, 188.

or otherwise require intermediate legislation. Instead, the Act governs citizens directly. Since States are not required under the Act to make state law, either through the legislative or the administrative process, the Act does not infringe on the "power of making rules or laws to govern" that is "the essence of sovereignty."[12] As the Ninth Circuit correctly noted, the Court in *New York* "was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act." *Mack*, 66 F.3d at 1030.

Federal action also can violate the etiquette of federalism by imposing burdens on state officials that are heavy enough to disrupt the States' "separate and inedependent existence."[13] The minimal duties imposed by the Brady Act, however, do not create such a burden. *See Frank*, 78 F.3d at 831; *Mack*, 66 F.3d at 1031. A CLEO must make only "a reasonable effort" to determine whether the proposed purchase is lawful. 18 U.S.C. § 922(s)(2). This affords the CLEO discretion to tailor background checks to local conditions and resources.[14] Furthermore, the records review of the background check is like a num-

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[12] *The Fallacies of the Freeman Detected by a Farmer* (1788), *reprinted in* 3 *The Complete Anti-Federalist* 183 (Herbert J. Storing ed., 1981); *see also FERC*, 456 U.S. at 761; *Thompson v. Oklahoma*, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting) (States' legislative processes are the "heart of their sovereignty").

[13] *See Mack*, 66 F.3d at 1032 ("[T]here is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment."); *see also Frank v. United States*, 78 F.3d 815, 830-31 (2d Cir. 1996).

[14] *See also* Open Letter to State and Local Law Enforcement Officials from John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms, U.S. Dep't of Justice 10 (Jan. 21, 1994) (recognizing that each law enforcement agency would "set it [sic] own standards" for its efforts, "based on its own circumstances, *i.e.*, the availability of resources, access to records and taking into account the law enforcement priorities of the jurisdiction"). Regulations implementing the Act also offer States flexibility in designating the CLEO for a particular area. *See Frank*, 78 F.3d at 825-26, 830-31.

ber of other background checks routinely handled by CLEOs for a range of purposes. *See Mack*, 66 F.3d at 1031; *see also FERC*, 456 U.S. at 760.[15]

Similarly, the requirement that CLEOs destroy documents or records received or generated as a result of the background check, 18 U.S.C. § 922(s)(6)(B)(i), and provide persons precluded from purchasing a handgun a written statement of explanation, if requested to do so, 18 U.S.C. § 922(s)(6)(C), are *de minimis*. Petitioner Mack's own testimony demonstrates that he met these obligations with ease.[16] The *de minimis* character of the Act's burdens should "end, rather than begin, the Court's constitutional inquiry." *South Carolina v. Baker*, 485 U.S. 505, 529 (1988) (Rehnquist, C.J., concurring); *see also infra* at 13-14 (discussing federal statutes upheld by the Court that imposed more onerous burdens on state officials).[17]

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[15] *See, e.g.*, Hearings on H.R. 975 and H.R. 155, at 118-19 (statement of Darwin McGlumphy, First Vice President, Ohio Union of Patrolmens Ass'n). Although Petitioners go to great lengths to make the obligation look as complicated and onerous as possible, these checks require only that the CLEOS apply straightforward criteria in a way they deem "reasonable." *See* 18 U.S.C. § 922(s)(2). The checks require far less discernment than tasks routinely required of law enforcement officers, such as determining whether a crime has been committed or whether a warrant is required under the Fourth Amendment.

[16] Petitioner Mack explained that "[m]y secretary keeps all the files and I just remind her from time to time that the files are to be destroyed after 20 days." Transcript of Proceeding at 9 (May 31, 1994). Similarly, in the three months during which Sheriff Mack conducted background checks, only one potential purchaser sought an explanation, and it appears that this request was met with a simple oral explanation. *See* Mack Petition App. at 65; Transcript of Proceeding at 7.

[17] Not only does the Act cost States relatively little, *see* H.R. Rep. No. 103-344, at 23-24 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 2000-01 (reprinting Congressional Budget Office Cost Estimate), but it also authorizes the appropriation of $200 million to the States to, among other things, improve their computerized criminal history records. *See* Brady Act § 106(b). Such fund-

In light of the minimal burdens imposed by the Brady Act, Petitioners are forced to argue that the Tenth Amendment bars the imposition of any federal duty on a state official. This Court has already considered and rejected such a categorical rule. Over a century ago, on the eve of the Civil War, the Court stated that Congress:

> has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State.

Dennison, 65 U.S. (24 How.) at 107, *overruled by Branstad*, 483 U.S. 219.[18] This view of federalism, however, was recently and emphatically rejected by this Court as "the product of another time," and as "fundamentally incompatible with more than a century of constitutional development." *Branstad*, 483 U.S. at 230; *see also FERC*, 456 U.S. at 761-62.

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ing demonstrates that "the national political process systematically protects States from the risk of having their functions in th[is] area handicapped by Commerce Clause regulation." *Garcia*, 469 U.S. at 555; *see also FERC*, 456 U.S. at 770 n.33 (Congress' "steps to reduce or eliminate the economic burden of compliance" will help a statute survive Tenth Amendment scrutiny.).

[18] Petitioners' view of the limits on federal power is similarly broad. Petitioners maintain that even the smallest federal imposition is unconstitutional. *See, e.g.*, Printz Brief at 22 (no *de minimis* exception, regardless of federal interest); *id.* at 25 (arguing that Congress may not require States to report missing children to a central database). The rationale offered for this position is strikingly similar to the *Dennison* standard quoted above. *See, e.g.*, NRA Amicus Brief at 7 (if the Federal Government can impose any duty on state officials, "the states will eventually be robbed of their funds, their resources and their independence; a pattern that will ultimately result in the destruction of federalism"). This apocalyptic view ignores the ability of the political process to protect the federal structure. *See Garcia*, 469 U.S. at 553 (noting that the political system has worked to provide States significant funding from the Federal Government); Unfunded Mandates Reform Act of 1995, 2 U.S.C.A. §§ 1501-1571 (West Supp. 1996) (protecting States from costly federal mandates).

Since *Dennison*, the Court repeatedly has recognized that valid acts of Congress may alter the duties and obligations of state and local officials under state law;[19] may alter the States' independent policy choices;[20] and may impose financial burdens on the States.[21] For example, the Court has upheld federal legislation requiring that state officials "consider" adopting specific "rate design" and regulatory standards, follow defined procedures when doing so, and make publicly available a written statement of reasons if the proposed standards were rejected;[22] issue bonds in registered, as opposed to bearer, form, *see Baker*, 485 U.S. at 514; adjudicate disputes arising under federal law, *see, e.g., Testa v. Katt*, 330

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[19] *See, e.g., Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985) (upholding federal statute granting local officials discretion in spending federal funds notwithstanding state law expressly limiting that discretion); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) (noting that state regulatory officials may be ordered to prepare rules enforcing rights under a treaty, even though "state law withholds from [state officials] the power to do so").

[20] *See, e.g., FERC*, 456 U.S. at 766 ("valid federal enactments may have an effect on state policy"); *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912) (When Congress acted "it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature . . . .").

[21] *See, e.g., FERC*, 456 U.S. at 770 n.33 (" '[T]he determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States.' " (quoting *Hodel*, 452 U.S. at 292 n.33)); *see also Garcia*, 469 U.S. at 555 n.21.

[22] *See FERC*, 456 U.S. at 758-71. The Court premised its decision in *FERC*, in part, on the fact that "Congress could have preempted the field," *id.* at 765, which is true in the present case as well. Although the *FERC* Court observed that, as a theoretical matter, States could have avoided the federal requirements imposed by the legislation by ceasing regulation of public utilities altogether, it conceded that this was not a realistic "choice," particularly since Congress had failed to provide any "alternative regulatory mechanism to police the area in the event of state default." *Id.* at 766; *see also id.* at 781-82 (O'Connor, J., dissenting in part).

U.S. 386 (1947); extradite fugitives to a federal territory, *Branstad*, 483 U.S. at 229-30;[23] and comply with federal employment standards or guidelines, *see, e.g., EEOC v. Wyoming*, 460 U.S. 226 (1983).[24] In addition, current statutes impose federal obligations on state officials similar to those imposed by the Brady Act. These statutes range from laws requiring state law enforcement agencies to report cases of missing children to the Department of Justice, 42 U.S.C.A. § 5779(a) (West Supp. 1995), and state officers to report traffic fatalities to the Department of Transportation, 23 U.S.C. § 402(a),[25] to a statute re-

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[23] *Branstad* does not deal solely with the power to enforce constitutional mandates. To the contrary, the Court expressly rejected respondents' argument that extradition to Puerto Rico could not be ordered because Puerto Rico, as a territory, was outside the scope of the Extradition Clause. The Court instead concluded that the scope of the Extradition Clause would not matter because Puerto Rico was covered under the Extradition Act:

> It is true that the words of the Clause apply only to 'States,' and we have never held that the Commonwealth of Puerto Rico is entitled to all the benefits conferred upon the States under the Constitution. We need not decide today what applicability the Extradition Clause may have to the Commonwealth of Puerto Rico, however, for the Extradition Act clearly applies.

Id. at 229. The Court accordingly recognized Congress' power to order extradition beyond what might be required under the Constitution.

[24] *See also Ex Parte Siebold*, 100 U.S. 371, 391 (1879) (suggesting that Congress could enact national standards for weights and measures, leave inspection to state officials, and punish state officials who failed to enforce those standards with criminal sanctions).

[25] Petitioner Printz wrongly asserts that the traffic-fatality reporting requirement is tied to the receipt of federal funds. Printz Brief at 25 n.31. States are required to: (1) have a highway safety program approved by the Secretary of Transportation; and (2) collect and report data to the Secretary of Transportation. 23 U.S.C. § 402(a). Only the first duty is tied to funding. *See* 23 U.S.C. § 402(c).

quiring that States keep records on asbestos in schools, 20 U.S.C. § 4013.[26]

In sum, the Brady Act neither requires state legislation nor overburdens state officials. As such, it fits comfortably within the etiquette of federalism. The Court should decline Petitioners' invitation to recast the rules of federal-state interaction.

B. The Brady Act Is Consistent With Principles of Political Accountability.

The federal structure is designed to protect individual liberty by establishing dual sovereigns, each of which operates as a check on the exercise of the other's power. *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring); *New York*, 505 U.S. at 181. The federal structure can achieve this end, however, only if citizens can hold the proper sovereign politically accountable for its actions:

> If, as Madison expected, the federal and state governments are to control each other, *see* The Federalist No. 51, and hold each other in check by competing for the affections of the people, *see* The Federalist No. 46, those citizens must have some means of knowing which of the two governments to hold accountable . . . .

Lopez, 115 S. Ct. at 1638 (Kennedy, J., concurring). For this reason, the courts will intervene if an exercise

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[26] *See also, e.g.*, Superfund Amendments of 1986, 42 U.S.C. § 6991a(c) (requiring each State to make "inventories of all underground storage tanks in such State containing regulated substances . . . [and] submit such aggregated data to" a federal official); Hotel and Motel Fire Safety Act of 1990, as amended, 15 U.S.C.A. § 2224(a)(1) (West Supp. 1996) (requiring each State to submit to the Federal Government "a list of those places of public accommodation affecting commerce located in the State" that meet federal fire prevention and control guidelines); National Voter Registration Act of 1993, 42 U.S.C.A. § 1973gg-5 (West 1994) (requiring States to provide voter registration materials at state and local government offices).

of the Commerce Power causes a breakdown in the political process.[27]

In *New York*, the Court was confronted with a Congress that ducked the issues raised by low-level radioactive waste while simultaneously requiring that the States tackle those issues and adopt a state law solution. Such federal legislative maneuvering creates an unacceptable risk that the State will be held unduly accountable for the resulting policy: citizens will see the state policy but not the federal command behind it. *See* 505 U.S. at 168-69 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."). To hold the proper sovereign properly accountable under such circumstances, the public has to pierce through the state law or regulatory program that directly affects them and determine whether and to what extent the state law or regulation was mandated by the Federal Government. Federal laws that require intermediate state legislation are unconstitutional because they inevitably blur political accountability.[28]

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[27] *See New York*, 505 U.S. at 168-69; *Garcia*, 469 U.S. at 554 ("Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings of a national political process . . . ."); *cf. Reynolds v. Sims*, 377 U.S. 533, 562, 565 (1964) (noting crucial role of equal apportionment, reflected in the one person, one vote standard, in ensuring that state legislatures reflect the popular will); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("Abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."); *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (noting likelihood that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny").

[28] Contrary to the Fifth Circuit's suggestion in *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996), *New York* does not hold that all state officials must have the "choice" not to undertake a federal

The Brady Act does not have the same effect on political accountability. First, and foremost, the Act does not blur federal responsibility by requiring intermediate state legislation or regulation. It is the Act—not a state law or regulation—that requires a waiting period and a background check before purchasing a handgun. Federal law requires that prospective handgun buyers deal with a federally licensed dealer, fill out a form that is "unmistakably" federal in origin, and meet certain criteria. *See* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law*, 95 Colum. L. Rev. 1001, 1064 n.241 (1995) (hereinafter "Caminker"); *see also Frank*, 78 F.3d at 828. If a prospective purchaser of a handgun becomes aware that state officials conduct the background checks (and is not already aware that the checks are done pursuant to the Brady Act), he or she is likely to learn of the federal origin of the requirement from those officials. *See* Caminker at 1064 & n.241 (CLEOs have an incentive to explain the federal origin of the records checks). In particular, a CLEO has a special opportunity to mention the Brady Act to any disqualified purchaser who requests an explanation for his or her disqualification. *Id.*

Second, nothing in the history of the Brady Act suggests that Congress acted with an eye to avoiding political

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duty. Choice is an important element in evaluating whether a command to a legislature diminishes political accountability. The essence of a legislator's duty is to choose public policies, and the public can and does hold legislators directly accountable for those policies. *See New York*, 505 U.S. at 168; *FERC*, 456 U.S. at 785 (O'Connor, J., concurring in part and dissenting in part). Choice is a less important element in evaluating whether a command to an executive official diminishes political accountability. The essence of an executive official's role is to execute duties imposed on him or her by others—whether or not the executive official agrees with those policies. *See infra* at 20-21 (contrasting legislative and executive commandeering). The imposition of federal duties on an executive official therefore does not create a structural risk to political accountability, as a citizen must routinely look beyond an executive official to locate the accountable politician.

responsibility for the Act. *Cf. FERC*, 456 U.S. at 787 n.19 (O'Connor, J., dissenting) (noting that the Federal Government would tend to foist unpopular programs on the States in order to transfer political liability for those programs). The Act is instead a tremendous success,[29] and there is no evidence that Congress has sought to disavow its enactment. Nor has Congress shifted to the States a function that the Federal Government might perform equally well. Rather, Congress made an informed decision that during the Act's interim period, the CLEOs' access to the relevant records, particularly state criminal records, and their personal knowledge of their communities, would make them "best able to determine if the individual is disqualified to own a gun."[30] Further, Congress provided for complete federal responsibility once the program can be operated effectively by the Federal Government alone.

Third, the Brady Act has in fact already engendered political accountability. The Brady Bill was the subject of a highly visible, seven-year debate in Congress. As the Court in *New York* explained, concerns about accountability will be diminished when "the Federal Government . . . makes the decision in full view of the public." 505 U.S. at 168. The public debate over the Act has continued since its passage. For example, and contrary to the suggestion in their amicus brief, the NRA has asserted

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[29] *See, e.g.*, H.R. Rep. 103-344, at 9; 139 Cong. Rec. H9105 (daily ed. Nov. 10, 1993) (statement of Rep. Coyne); William Recktenwald & Linda Harrington, *Outrage Over Guns On Rise*, Chi. Trib., June 4, 1993, at 1 (89 percent of Americans support Brady Bill); Dennis Cauchon, *Poll: Owners Favor Gun Laws*, USA Today, Mar. 17, 1993, at 1A (88 percent of gun owners support the Brady Bill); *Does Congress Hear the Gunfire?*, Wash. Post, Mar. 5, 1993, at A20 ("Every substantive poll taken in recent years has shown [the Brady Bill] enjoys overwhelming public support."); Eric Brazil, *State Poll Supports Gun Curb, Not Ban*, S.F. Examiner, May 8, 1993, at A1 (93 percent of Californians support Brady Bill); George Gallup, Jr., *The Gallup Poll: Public Opinion 1991*, at 83 (1992) (93 percent of Americans support Brady Bill).

[30] H.R. Rep. No. 101-691, at 11 (1990); *see also supra* at 2-3 & n.4.

that voters in 1994 sought retribution against federal legislators who voted for the Brady Act.[31] The Brady Act also has had prominence in the 1996 presidential campaign. President Clinton featured the issue in his acceptance speech to the Democratic National Convention;[32] James and Sarah Brady thanked the U.S. Congress and the President for passing and signing the Brady Bill in a nationally televised speech to the Democratic National Convention;[33] President Clinton featured passage of the Brady Act in his opening statement in, and the Act was the subject of a principal question to Senator Dole during, the first presidential debate;[34] and President Clinton has made the Brady Act an important part of his campaign activities generally.[35] Because federal officials have not

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[31] *Compare* NRA Amicus Brief at 21 *with, e.g.*, John F. Persinos, *Brave Newt World: Top Pros Analyze the Midterm Election Results, Speculate About the Future*, Campaigns & Elections (Dec. 1994/Jan. 1995).

[32] *See, e.g., Hope Is Back in America*, Wash. Post, Aug. 30, 1996, at A36 (text of President Clinton's nomination acceptance speech).

[33] *See, e.g., We Can Restore Peace*, Wash. Post, Aug. 27, 1996, at A17 (text of speech by James and Sarah Brady to the Democratic National Convention); Dan Balz, *Democrats Debut With Emotional Appeal; Reeve, Brady Speeches Highlight Evening*, Wash. Post, Aug. 27, 1996, at A1.

[34] *See Campaign '96: Transcript of the First Presidential Debate*, Wash. Post, Oct. 7, 1996, at A8, A9.

[35] *See, e.g., Bill Clinton: In His Own Words*, Chi. Sun-Times, Oct. 2, 1996, at 4 (text of Clinton campaign speech); Joel Connelly & Ellis E. Conklin, *Clinton's Tour Reaches Out on Back Roads*, Seattle Post-Intelligencer, Sept. 20, 1996, at A1 ("Clinton hammered at some of those votes, notably the Brady law . . . ."); John F. Harris, *Next Stop, Campaign Heaven; Clinton Is in His Political Element on Rails*, Wash. Post, Aug. 27, 1996, at A1 (noting Clinton's use of his proposal to expand the Brady Act); Martha T. Moore, *Clinton Ad Campaign Attacks Dole's Record During His 35 Years in Congress*, USA Today, Sept. 24, 1996, at 9A (text of ad highlighting Dole vote against Brady Bill); E. Michael Myers, *Democrats Unveil Newest Attack Ad; Warns of GOP Control of Congress and White House*, Wash. Times, Aug. 16, 1996, at A13 (text of ad noting, *inter alia*, that Brady Act would not have become law had Dole been President instead of Clinton).

"remained insulated from the electoral ramifications of their decision," *New York*, 505 U.S. at 169, this Court need not intervene to protect the political process.[36]

Finally, Petitioners are mistaken in arguing that the Brady Act unconstitutionally puts them at risk of being blamed when a potential purchaser is denied a handgun. Any such risk is minuscule. As Sheriff Mack's own experience reveals, the issue rarely arises. *See* Mack Brief at 30 (during three months conducting background checks, only one disgruntled purchaser sought an explanation). The vast majority of handgun purchasers fill out the federal form and, because their purchase is approved, never encounter the CLEO. Of the minority whose purchases are disallowed, only a smaller group—those who demand an explanation—will have contact with the CLEO. Finally, the interaction between those few disgruntled potential purchasers and CLEOs provides an ideal opportunity for the CLEO to place appropriate responsibility on the Federal Government.

There is likewise little risk that a CLEO will be held accountable for the use of resources on background checks. Sheriffs (and other CLEOs) are fundamentaly unlike legislators. As Justice O'Connor explained in comparing judges and legislators, legislators are unique in that they are deemed to speak for themselves; because they have "the power to choose subjects for legislation."

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[36] Petitioner Mack's own vocal opposition to the Act illuminates how political accountability has been ensured without judicial intervention. *See* Mark Shaffer, *Gun Suit Shoots Sheriff into Spotlight: Richard Mack in Demand as Brady Act Foe*, The Ariz. Republic, July 5, 1994, at B1 (Mack "has spent virtually every weekend making speeches at pro-gun rallies around the West," has appeared "on more than 50 radio talk shows," as well as *Good Morning America* and *The Phil Donahue Show*, and appears on t-shirts sold at local handgun stores.). Sheriff Mack has even written a book sharing his views about handgun control. *See* Richard I. Mack & Timothy R. Walters, *From My Cold Dead Fingers: Why America Needs Guns!* (1994) (focusing on his opposition to the Brady Act and the federal government's alleged conspiracy to suppress individual rights).

FERC, 456 U.S. at 785 (O'Connor, J., concurring in part and dissenting in part). Sheriffs, like judges, routinely do not have the power to choose their own subjects. *See id.* at 784-85. Sheriffs are bound to execute duties imposed on them by statutes written without their approval. They are held accountable not for the substance of those duties, but for the skill and diligence with which the duties are performed, regardless of their source.[37]

II. THE FRAMERS CONTEMPLATED THAT CONGRESS COULD REQUIRE STATE AND LOCAL OFFICIALS TO IMPLEMENT FEDERAL LAW.

The historical record demonstrates that the Framers intended that Congress have the power to "commandeer state executives and state courts, but not state legislatures, to help implement its constitutional powers."[38] Indeed, the very sentence of Alexander Hamilton cited in *New York* to establish the Framers' intention that the Federal Government "'must stand in need of no intermediate legislations,'" *New York*, 505 U.S. at 163 (citation omitted), explains that the Federal Government "must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions." *The Federalist No. 16*, at 165 (Hamilton).[39]

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[37] *See, e.g.*, "Voters Reject Sheriff Who Challenged Brady Gun Law," AP, Sept. 12, 1996, *available in* WESTLAW, ASSOCPPS database (explaining Sheriff Mack's recent election loss as a reaction to his lack of diligence in pursuing, rather than the content of, his law enforcement duties); Tony Mauro, *Mack Attack*, Legal Times, Sept. 30, 1996, at 10 (same).

[38] Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957, 1962 (1993) (hereinafter "Prakash"); *see also* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633 (1993) (hereinafter "Powell"); Samuel H. Beer, *To Make A Nation: The Rediscovery of American Federalism* 252 (1993) (hereinafter "Beer").

[39] The "magistracy" included state executive and judicial officers. *See Prakash* at 1961 n.26; *see also Gordon v. Hobart*, 10 F. Cas. 795, 796 (C.C.D. Me. 1836) (No. 5609) (Story, J.); *The Federalist No. 16*, at 166 (Hamilton); *The Federalist No. 47*, at 337-38 (Madison).

The Framers indicated on numerous occasions that the state magistracy might be called upon to implement federal law.[40] Indeed, those who supported ratification of the Constitution emphasized this intention in order to reassure those who feared that the Constitution would displace local authority and bring unfamiliar federal officials into their towns and communities. Alexander Hamilton, for example, assuaged concern that federal tax collectors would be ignorant of "local details," by observing that "[t]he national legislature can make use of the *system of each State within that State*" for laying and collecting taxes.[41] James Madison, addressing the same apprehension, noted that "it is extremely probable, that . . . officers of the States will be clothed with the correspondent authority of the Union" and that "the eventual collection [of internal taxes], under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States." *The Federalist No. 45*, at 328 (Madison).[42]

The Framers' vision of a cooperative federalism extended beyond the collection of taxes. Hamilton explained that the fledgling Federal Government would earn the respect of the citizenry by borrowing the prestige of the States. Because the Constitution "will enable the government to *employ the ordinary magistracy of each [of the States], in the execution of its laws*," the Federal Government will enjoy "the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State." *The Federalist No. 27*, at 221

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[40] *See* Prakash at 1990-2032; Powell at 659-64.

[41] *The Federalist No. 36*, at 261 (Hamilton) (emphasis in original); *see also id.* at 263 ("the probability is, that the United States will . . . make use of the State officers and State regulations for collecting [federal taxes]").

[42] Madison expected the new Federal Government to govern through the state governments in a manner similar to the way the New England states governed through local governments. Beer at 252.

(Hamilton) (emphasis added).[43] In the absence of a substantial federal administrative apparatus, the Federal Government's power to use state officers necessarily was central to the Framers' conception of a national government "capable of regulating the common concerns." *The Federalist No. 16*, at 165 (Hamilton).

Even those who opposed the Constitution understood that it allowed for federal commandeering of state officials. Indeed, Patrick Henry warned that "[t]he sheriff comes to-day as a state collector" and the next day as a "federal" collector. 3 *Debates* 168 (Jonathan Elliot ed., 1836). Similarly, in a rejoinder to the Federalists, Agrippa acknowledged that "[a]ll the state officers are . . . bound by oath to support this constitution," and, by operation of the Supremacy Clause, are bound "to execute the continental laws in their own proper departments within the state." Letter from Agrippa to the People (Dec. 11, 1787), *reprinted in* 4 *The Complete Anti-Federalist* 78 (Herbert J. Storing ed., 1981).

Early Congresses, moreover, relied on state and local officials to assist in the application of federal law. Thus, in enacting the Naturalization Act of 1790, the very same Congress that adopted the Tenth Amendment imposed certain ministerial duties on state court clerks.[44] Shortly

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[43] In particular, Hamilton believed that local law enforcement officers could be used to enforce federal regulations. In *The Federalist No. 16*, Hamilton explains that "[i]f opposition to the national government should arise from the disorderly conduct of refractory or seditious individuals, it could be overcome by the same means which are daily employed against the same evil under the State governments. The magistracy, being equally the ministers of the law of the land, from whatever source it might emanate, would doubtless be ready to guard the national as the local regulations from the inroads of private licentiousness." *The Federalist No. 16*, at 166 (Hamilton).

[44] Naturalization Act, ch. 3, § 1, 1 Stat. 103 (1790). The Act provided that an alien eligible for citizenship may apply to "any common law court of record" in a State where he has lived for one year "and the clerk of such court *shall* record such application, and the proceedings thereon." *Id.* at 103-04 (emphasis added).

thereafter, Congress enacted statutes requiring that "the executive authority of any . . . state or territory to which [a fugitive from justice] shall have fled" return the fugitive to the State from which he fled upon demand from the executive of that State or territory;[45] that state courts "cause" the apprehension of certain aliens—presumably through the local sheriffs;[46] and that the local justices of the peace, upon application by a ship's captain, gather local citizens skilled in maritime affairs and decide, with the citizens' assistance, whether and how a ship of uncertain seaworthiness might be repaired before continuing its voyage.[47] Petitioners' broad argument that the Federal Government may never look to state or local officials to implement federal law cannot be reconciled with either the Framers' vision or these early enactments.[48]

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[45] Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302. The obligation imposed on state executives under this legislation exceeded the similar obligation established in art. IV, § 2 of the Constitution, which does not extend to demands made by territories. *See Puerto Rico v. Branstad*, 483 U.S. 219, 229 (1987); *supra* note 23.

[46] Alien and Sedition Act, ch. 66, § 2, 1 Stat. 577 (1798) ("it shall be the duty of the several courts of the United States, and of each state, having criminal jurisdiction . . . to cause [aliens targeted by the statute] to be duly apprehended").

[47] Act of July 20, 1790, ch. 29, § 3, 1 Stat. 131, 132. The duties imposed on the justices of the peace under this statute, like those imposed by the statutes discussed *supra* relating to judicial branch officials, were more executive than judicial in nature. In fact, Section 7 of this statute was affirmed, against a challenge that it unconstitutionally delegated "the judicial power of the United States" to a state officer, because the duties assumed by the state justices of the peace were not those traditionally performed by courts. *See Robertson v. Baldwin*, 165 U.S. 275, 279 (1897). Early federal statutes requiring executive or administrative acts by state officials are collected at Caminker at 1045 & nn. 170-177.

[48] *See also* Act of Mar. 8, 1806, ch. 14, § 1, 2 Stat. 354 (requiring district attorneys of New York and Pennsylvania to appoint a state official to prosecute violations of federal revenue laws). Representative Elbridge Gerry summarized the perspective that led to these statutes when he stated:

> [N]othing could be plainer than this—that the General Government had a right to require the assistance of the officers

III. THE CHALLENGED PROVISIONS OF THE BRADY ACT ARE SEVERABLE.

Although Petitioners challenge only three provisions of the Brady Act, they seek to strike down all of the Act's interim provisions on the ground that they cannot be severed from the remainder of the Act. As every court faced with the issue has found, however, the unchallenged provisions are severable.[49]

To begin with, the Brady Act is severable because of the severability clause of the Gun Control Act of 1968, which the Brady Act amends.[50] A severability clause applies to a subsequent amendment of an Act. *See, e.g., Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977). Where such a clause exists there is "a presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon whether the [provision in question] was invalid." *INS v. Chadha*, 462 U.S. 919, 932 (1983); *see also Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938).[51]

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of the several State Governments; for they have severally taken an oath to support the Constitution of the United States. *History of Congress*, House, Apr. 25, 1792, at 579 (Gales & Seaton 1849).

[49] *See Koog v. United States*, 79 F.3d 452 (5th Cir. 1996); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994); *Romero v. United States*, 883 F. Supp. 1076 (W.D. La. 1994).

[50] The Handgun Control Act provides that "[i]f any provision of this chapter or the application thereof to any person or circumstances is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 18 U.S.C. § 928.

[51] There is no merit to Petitioner Printz's claim that the severability clause in the Handgun Control Act does not apply to the Brady Act. Printz attempts to analogize the Brady Act's severability clause to the severability clause discussed in *Alaska Airlines*,

Even absent the severability clause, the unchallenged portions of the Brady Act would be severable. This Court repeatedly has declared that "[a] court should refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation and citations omitted). As such, if the unobjectionable provisions of an act are "separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Id.* (internal quotation and citations omitted). In accord with this strong preference for severability, the standard for determining the severability of an unconstitutional provision is high:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Id. (internal quotation and citation omitted).

Here, it is clear that the unchallenged provisions of the Brady Act would be "fully operative as a law." Under the unchallenged provisions, prospective handgun purchasers still would be required to provide certain information to dealers, dealers still would be required to share that information with CLEOs, and, unless the relevant CLEO performed the background check sooner, each prospective purchaser still would be required to wait five business days before purchasing a handgun. The only difference would be that CLEOs, instead of being compelled

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Inc. v. Brock, 480 U.S. 678, 686 n.8 (1987). In that case, this Court noted, in dicta, that the application of the FAA's severability clause to the Employee Protection Program ("EPP") was "doubtful" because the EPP, which was enacted as part of the Airline Deregulation Act of 1978, did not amend the FAA but instead established an entirely new program. *Id.* The Brady Act, in contrast, clearly amended the Handgun Control Act rather than creating a new program, as the purpose of the Act is to add a means of enforcing the prohibitions already set forth in the Handgun Control Act.

to perform a background check, would have the option and opportunity to do so.

The opportunity to conduct checks is particularly meaningful because the overwhelming majority of the law enforcement community, including members of the amici organizations, are eager to perform background checks.[52] As the International Association of Chiefs of Police told Congress, "compelled or not, we in law enforcement management want to conduct the background checks."[53] The unchallenged provisions would result in background checks in an overwhelming majority of jurisdictions, and so function in a way completely consistent with the aims of the Brady Act.[54]

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[52] The overwhelming support of law enforcement for the Brady Act is evidenced not only by the participation of the national law enforcement groups in this brief, but also by the congressional testimony of police groups in favor of the Brady Act. *See, e.g., The Brady Handgun Violence Prevention Act: Hearing on S. 1236 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 101st Cong. 65-72 (1989) (statement of John Dineen, National Fraternal Order of Police, representing over 203,000 professional police officers nationwide); *Brady Handgun Violence Prevention Act: Hearing on H.R. 7 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 78-81 (1991) (statement of Lee Brown, Commissioner, New York City Police Dep't); *id.* at 112-14 (statement of Kenneth Collins, Chief of Police, Maplewood Minn. and President, Minnesota Ass'n of Chiefs of Police).

[53] *Hearing on H.R. 1025*, at 207 (statement of David B. Mitchell, Chief of Police, Prince Georges County Police Dep't, Palmer Park, Md., on behalf of the International Ass'n of Chiefs of Police).

[54] Contrary to another of Petitioner Printz's contentions, a voluntary system would not transform the waiting period from a maximum of five business days into a mandatory five business days. Nothing in the unchallenged provisions would prevent a CLEO from performing the background check in less than five business days and thereby shortening the waiting period. In addition, the waiting period would continue to serve the independent purpose of providing a "cooling off" period to prevent the sale of firearms for use in crimes of passion. *See* 139 Cong. Rec. H9089 (daily ed. Nov. 10, 1993) (statement of Rep. Derrick); *id.* H9106 (statement

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QUESTION PRESENTED

Does the Brady Handgun Violence Prevention Act, which temporarily requires state and local law enforcement officers to make a "reasonable effort" to ascertain the legality of proposed handgun transfers, transgress the Tenth Amendment by "commandeering" sovereign state authority?

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of respondent.

STATEMENT OF INTEREST OF THE AMICI CURIAE

The amici curiae States share an interest both in preserving a vigorous interpretation of the Tenth Amendment and in continuing the tradition of cooperation between the state and federal governments in important law enforcement missions, such as deterring violent crime by keeping handguns out of the hands of those likely to commit crimes. The amici States support the validity of the interim provisions of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (the "Brady Act"), because they are no different in kind from the type of joint state-federal law enforcement efforts that occur routinely in many contexts. For example, the States benefit from having access to computer information made available to state and local law enforcement officials nationwide by the National Crime Information Center. It is not at all surprising or paradoxical, then, that the amici States support the power of the federal government to devise a national approach to the ravages of handgun-related violence. Indeed, in the view of the amici States, this and other important law enforcement objectives would be undermined by an interpretation of the Tenth Amendment that balkanized law enforcement efforts by erecting an inflexible barrier to approaches that require some cooperation between the state and federal governments .

The amici States also have a strong interest in emphasizing that their support of the constitutionality of the challenged provisions of the Brady Act is grounded on an understanding that the provisions represent a minimal and temporary request for ministerial assistance from the States. Properly interpreted, these provisions afford state and local law enforcement officials substantial discretion in deciding how to carry out the required background checks in a way that does not interfere with or compromise state autonomy

in addressing law enforcement responsibilities.

SUMMARY OF ARGUMENT

The challenged provisions of the Brady Act continue the extremely valuable and constitutionally sound tradition of "cooperative federalism" in the law enforcement arena, a tradition originating contemporaneously with the establishment of our federal system. The First Congress, which framed the proposal ultimately ratified as the Tenth Amendment, also enacted a number of federal laws expressly requiring the reasonable assistance of state officials for their execution. By long practice, the compiling, storing, checking, and sharing of information for purposes of criminal law enforcement, as required by the Brady Act, are core areas of state-federal cooperation, as exemplified in the federal law that established a national crime information center. In fact, the challenged provisions of the Brady Act are transitional steps toward the development of a national system for instant criminal background checks, which is mandated to occur by 1998 and which will benefit all States. Viewed in their proper context, the challenged provisions of the Brady Act represent an entirely appropriate and constitutional interim approach to the daunting law enforcement challenge of containing the nationwide proliferation of handgun-related violence. This Court should not, and it need not, construe these provisions so broadly as to create hypothetical Tenth Amendment concerns.

The minimal interim role given to state and local law enforcement officers in implementing this system is considerably more respectful of state sovereignty than the federal obligations that this Court approved against a Tenth Amendment challenge in *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed. 532 (1982), as is evident

from an analysis of Justice O'Connor's partial dissent in that case. The Brady Act scheme is also consistent with this Court's decision in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed. 2d 120 (1992), because, unlike the statute in *New York*, the Brady Act does not regulate "States as States" and does not coerce state compliance. Properly interpreted, the Brady Act merely asks law enforcement officers, whose duty it is to apply and enforce controlling law, to make a reasonable effort, consistent with their own determination of law enforcement priorities, to ascertain whether a prospective handgun purchaser poses a threat to the community. In marked contrast to the statute at issue in *New York*, the interim provisions do not require legislative action by a State, but merely request that executive officers--law enforcement officials--undertake an activity that is similar to many performed in the normal course of their duties.

ARGUMENT

I. THE BRADY ACT CONTEMPLATES A MINIMAL INTERIM ROLE FOR STATE OFFICIALS

The challenged provisions of the Brady Act impose a minimal burden on the States. The requirements that state and local chief law enforcement officers ("CLEOs") conduct background checks on prospective handgun purchasers will expire on or before November 30, 1998, when the national instant background check system provided in the Act will be implemented, allowing for firearms sellers to perform the checks at the point of sale. According to the Open Letter to State and Local Law Enforcement Officials from the Bureau of Alcohol, Tobacco and Firearms dated January 21, 1994, Excerpts of Record on Appeal at 28, reproduced at Appendix to Brief for the United States, *Printz v. United States*, No. 95-1478, at 17a,

the Brady Act "anticipates *some minimal effort* to check commonly available records. It is not realistic to expect the CLEO to have available, or check, every conceivable record system that may contain information relating to categories of prohibited persons." (emphasis added). As construed by the Bureau of Alcohol, Tobacco and Firearms ("ATF"), the agency charged with interpreting and implementing the Gun Control Act, 18 U.S.C. § 926, the challenged provisions of the Brady Act are not coercive in the least. *Cf. United States v. Rutherford*, 442 U.S. 544, 99 S.Ct. 2470, 61 L.Ed. 2d 68 (1979) (construction of statute by agency charged with its administration is entitled to substantial deference). For example, the ATF recognizes that "[t]he level of research may justifiably vary among law enforcement agencies," each of which would "set its own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." If the CLEO mistakenly informs a federal firearm licensee that a prospective purchaser is prohibited from purchasing a handgun, the Brady Act provides that the CLEO shall not be liable for preventing the sale. Most checks can be accomplished through use of the National Crime Information Center (the "NCIC"), which the Attorney General has designated as "the national system to be used by law enforcement for crime history record background checks under the interim provisions of the Brady Handgun Violence Prevention Act." 59 Fed. Reg. 9498 (Feb. 24, 1994).

Moreover, Congress has provided substantial benefits through the Brady Act to fund state law enforcement activities. The Act authorizes $200 million in grants to States to create "a computerized criminal history record system" or to improve existing systems, as well as funds to

assist States in transmitting information to the national system once it is online. This funding supplements $850 million in federal funding for improvement of state criminal history records and other law enforcement purposes through the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690.

In view of the ATF's narrow interpretation of the requirements of the Brady Act and the federal assistance to States to facilitate criminal history information systems, the Brady Act's requirement of "reasonable effort to ascertain" the legality of a handgun transfer constitutes at most a very slight burden on the States.[1] This interpretation is faithful to the statutory language and avoids Tenth Amendment issues that might arise if the provisions were read as imposing truly burdensome obligations on State officials. *See New York v. United States*, 505 U.S. 144, 170, 112 S.Ct. 2408, 2425, 120 L.Ed. 2d 120, 146 (1992) (noting that, when parties urge two conflicting views of federal requirements imposed on States, and one "construction of [the] statute would raise serious constitutional problems, the

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[1] The burden is also diminished by the fact that the interim provisions do not apply in the 28 States (including Maryland) and two territories that have background check or permit requirements. *See* 18 U.S.C. 922(s)(1)(C)-(D); *see also* Md. Art. 27 § 442; Code of Maryland Regulations 29.03.01.08 (requiring seven-day waiting period and background check before transfer of a pistol, revolver or assault weapon). Also exempted under these provisions are four of the eight States that have filed an amicus brief in support of the Petitioners--Colorado, Idaho, Nebraska, and Virginia. The other exempted States and territories are California, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oregon, Tennessee, Utah, Virgin Islands, Washington, and Wisconsin.

Court will construe to avoid such problems unless such construction is plainly contrary to the intent of Congress") (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed. 2d 645, 654 (1988)). Moreover, the criminal penalty provisions in the Brady Act, *see* 18 U.S.C. §924(a), do not apply to government officials.

II. THE BRADY ACT PROVISIONS ARE CONSISTENT WITH THE TRADITION AND ORIGINAL UNDERSTANDING OF STATE-FEDERAL COOPERATION IN LAW ENFORCEMENT

A. The First and Second Congresses Recognized the Validity of State Officers Assisting with Federal Duties

The challenged provisions of the Brady Act resemble legislation passed by the First and Second Congresses and fit comfortably within the design of federal-state relations contemplated by those bodies. The First Congress, the very body that framed the language of the constitutional proposal that was eventually ratified by the States as the Tenth Amendment,[2] had to establish the entire structure of the new federal government, including enforcement of federal law and the collection of duties, imposts, and customs revenues, a mammoth task that could hardly be accomplished at once. With respect to the collection of federal duties, in particular, an interesting succession of legislation ensued with direct parallels to the interim and permanent provisions of the Brady Act.

The First Congress provided almost immediately for the

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[2] The Tenth Amendment, as part of the original Bill of Rights, was proposed by the First Congress and was not ratified by the requisite number of States until December 15, 1791.

establishment and appointment of districts, ports, and officers to collect "the duties imposed by law on the tonnage of ships and vessels, and on goods, wares and merchandises imported into the United States." Act of July 31, 1789, ch. V, 1 Stat. 29 (1789). The law did not, however, initially preempt state authority and transfer it to federal officials; indeed, no initial provision was made at all for such federal officials in North Carolina and Rhode Island. *See id.* Instead, the Congress used certain state officials to undertake collection of other tonnage duties by enacting federal legislation that expressly declared congressional consent to the operation of such state procedures. *See* Act of August 11, 1790, ch. XLIII, 1 Stat. 184 (1790) (concerning Maryland, Georgia, and Rhode Island); *see also* Act of February 9, 1791, ch. V, 1 Stat. 190 (1791) (Baltimore, Maryland); Act of March 19, 1792, ch. X, 1 Stat. 243 (1792) (Baltimore, Maryland).[3] The Congress thus built upon Alexander Hamilton's observation in the *Federalist* that with respect to import duties, "the probability is that the United States will . . . make use of the State officers and State regulations for collecting the additional imposition." *The Federalist,* No. 36 at 221 (A. Hamilton) (C. Rossiter ed.).[4]

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[3] The resulting authority that was exercised by the wardens of the port of Baltimore, apparently under both Maryland law and federal law pursuant to these statutes, later gave rise to the famous test case in the United States Supreme Court on the important federalism issue of whether the Bill of Rights could be applied to state officials or only to federal officials, as the Court ultimately held. *See Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833).

[4] Similarly, James Madison opined in a later paper that the collection of revenues "under the immediate authority of the

Like the Brady Act itself, these statutes were enacted as interim measures for periods of one to three years. They thus stood as congressional mandates to state officials to exercise federal power, in preference to the only feasible alternative, which was full preemption of state authority and occupation of the entire field by the federal government. Significantly, they accomplished that object by operating directly through state officials.

The First Congress also enacted several measures that imposed direct obligations upon state officials, all of them directly analogous to the Brady Act in the sense that they were reasonable in scope and not unduly intrusive into state sovereign functions. For example, the statute that prescribed the form of the mandatory oath or affirmation to support the Constitution of the United States was made applicable not only to federal officials, but also to state legislators and to state executive and judicial officers. *See* Act of June 1, 1789, ch. I, §3, 1 Stat. 23 (1789). In addition, the original statute authorizing the prosecution and punishment of treason against the United States required cooperation by the governors and judges of the several States in gathering information about any such activities. *See* Act of April 15, 1790, ch. IX, §2, 1 Stat. 112 (1790).

The Second Congress also enacted legislation that imposed direct obligations upon state executive officials. The statute that established the mechanism for conducting Presidential elections, for example, imposed specific duties on "the executive authority" of the States. *See* Act of March 1, 1792, ch. VIII, §3, 1 Stat. 240 (1792). And even more far-reaching was the original Fugitive Slave Act,

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Union, will generally be made by the officers, and according to the rules, appointed by the several States." *The Federalist*, No. 45, at 292.

which imposed significant duties directly upon "the executive authority" of the States to cause certain persons "to be arrested and secured, and notice of the arrest to be given," and "to cause the fugitive to be delivered to such agent when he shall appear." Act of February 12, 1793, ch. VII, §1, 1 Stat. 302 (1793). *See also* Act of May 2, 1792, ch. XXVIII, 1 Stat. 264 (1792) (setting out President's authority over state militia and imposing corresponding duties on the officers thereof). Thus, the legitimacy of federal legislation requiring reasonable assistance from state executive officials was assumed by the legislators who established the original understanding of state-federal relations.

B. The Compiling, Storing, Checking, And Sharing Of Information For Criminal Law Enforcement Between The States And The Federal Government Is An Area Of Traditional Intergovernmental Cooperation.

The tradition of cooperative federalism in the law enforcement context has been particularly strong. *See Elkins v. United States*, 364 U.S. 206, 211, 80 S.Ct. 1437, 1440, 4 L.Ed. 2d 1669, 1674 (1960) (recognizing "the entirely commendable practice of state and federal agents . . . cooperat[ing] with each other in the investigation and detection of criminal activity."). Throughout our nation's history, federal officials and state and local law enforcement officers have teamed up to conduct investigations, gather facts, identify and pursue suspects, make arrests and charging decisions, and prepare prosecutions for crime. Such cooperation has become commonplace because of its obvious benefits. As Congress has concluded about two of the nation's most urgent crime problems, "cooperation among Federal, State and local law

enforcement agencies is critical to an effective national response to the problems of violent crime and drug trafficking in the United States." Pub. L. No. 101-647, §612(2), 104 Stat. 4823 (1990). In addition, further coordination occurs regularly on such matters as detainers, extraditions, sentencings, and confinement and handling of prisoners. In these and many other areas, the States and the federal government constantly share information and resources in pursuit of the common objective of enforcing federal and state criminal laws. Here and in other contexts, this Court's Tenth Amendment decisions have recognized the value and legitimacy of the state and federal governments combining their resources to work together through various forms of "cooperative federalism." *See, e.g., FERC*, 456 U.S. at 765-770, 102 S.Ct. 2126, 2140-2143, 72 L.Ed. 2d 532, 550-554; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289, 101 S.Ct. 2352, 2367, 69 L.Ed. 2d 1, 24 (1981).

Strong state-federal cooperation is absolutely essential to effective law enforcement. This cooperation was much in evidence in a number of recent highly publicized investigations, including the crash of TWA Flight 800 and the bombing at the Atlanta Olympics. State law enforcement officials expect and need the support and assistance of their federal counterparts and, indeed, state officials understand that in appropriate cases they must take direction from federal officials. The already considerable problems inherent in conducting successful criminal investigations in this vast country of 50 states would be multiplied by a constitutional rule which encourages states to withdraw from such cooperative efforts.

Moreover, the interaction between state and federal government in the law enforcement arena has substantially benefitted the states. As this Court has recognized, this

beneficial symbiotic relationship is relevant to the Tenth Amendment analysis; it should be recognized that the modern tools of criminal law enforcement have been significant in "allow[ing] the States . . . to enact and administer their own [laws,] structured to meet their own particular needs," while also permitting the federal government to do the same. *Hodel*, 452 U.S. at 289, 101 S.Ct. at 2367, 69 L.Ed. 2d at 24. The modest tasks that the Brady Act temporarily imposes on state officials should be judged together with the substantial benefits that the States receive under the Brady Act and through pervasive use of the NCIC.

III. THE BRADY ACT IS CONSISTENT WITH A ROBUST INTERPRETATION OF TENTH AMENDMENT PRINCIPLES

The amici States fully support the robust view of state sovereignty under the Tenth Amendment reflected in this Court's opinion in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed. 2d 120 (1992) and in Justice O'Connor's partial dissent in *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed. 2d 532 (1982). Upholding the interim provisions of the Brady Act is perfectly consistent with a vigorous interpretation of the Tenth Amendment and respects state sovereignty in determining law enforcement priorities. As Justice Kennedy recently observed in a different but related context: "This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, *cf. New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed. 2d 120 (1992), or to organize its governmental functions in a certain way, *cf. FERC v. Mississippi*, 456 U.S. at 781 (O'Connor, J., concurring in judgment in part and dissenting in part)." *Lopez v. United States*, 115 S.Ct. 1624, 1642, 131

L.Ed. 2d 626 (1995) (Kennedy, J., concurring).

A. The Brady Act Is Significantly More Respectful of State Sovereignty than the Law Upheld by the Majority in *FERC v. Mississippi*

In *FERC*, this Court upheld against a Tenth Amendment challenge a federal regulatory scheme far more intrusive than the interim provisions of the Brady Act. There, this Court approved "Federal Government attempts to use state regulatory machinery to advance federal goals" of a national energy conservation policy. 456 U.S. at 759, 102 S.Ct. at 2137, 72 L.Ed. 2d at 546. The statute affirmed in FERC *mandated* that state public utility commissions hold public hearings, conducted in accordance with federally prescribed procedures and by specified deadlines, to review and consider the adoption a range of detailed federal regulatory standards, and then produce for public inspection a written statement of reasons if the federal standards were not adopted. *Id.* at 746-50, 102 S.Ct. at 2130-2132, 72 L.Ed. 2d at 538-541. The statute empowered "any person" to bring an action in state court to enforce the State's obligation to hold hearings and review the federal standards. *Id.* In addition, the statute imposed annual reporting requirements on state regulatory authorities to describe their consideration of the federal standards. *Id.*

Despite these extensive mandates to state regulatory authorities, Justice Blackmun's opinion for the *FERC* majority found the statute valid under the Tenth Amendment because it did not "'directly compel' the States to enact a legislative program," 456 U.S. at 765, 102 S.Ct. at 2141, 72 L.Ed. 2d at 550, or "'commandeer[] the legislative processes of the States,'" *id.* at 764-765, 102 S.Ct. at 2140, 72 L.Ed. 2d at 550 (quoting *Hodel*, 452 U.S.

at 288, 101 S.Ct. at 2366). The Court acknowledged that the statute imposed significant compliance requirements on the States, but noted that Congress had appropriated $40,000,000 for each of the first two fiscal years "to help state regulatory authorities defray the costs of complying with [the federal law]." *Id.* at 751 n.14, 102 S.Ct. at 2126. Nonetheless, this Court held that the fact that the statute imposed obligations on state executive officials did not render the statute *per se* unconstitutional, and it rejected the view that the Tenth Amendment categorically forbids Congress from enacting laws that require some degree of assistance from state executive officials. In so holding, the Court disavowed the "19th century view" reflected in a "rigid and isolated statement" from *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107, 16 L.Ed. 717, 729 (1861), that Congress "'has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.'" *FERC*, 456 U.S. at 761, 102 S.Ct. at 2138; *see also id.* at 762-763, 102 S.Ct. at 2139 (citing *Testa v. Katt*, 330 U.S. 386, 393, 67 S.Ct. 810, 91 L.Ed. 967 (1947), which "reveals that the Federal Government has some power to enlist a branch of state government -- there the judiciary -- to further federal ends.").[5]

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[5] More recently, this Court has overruled *Dennison*, unequivocally rejecting its rigid notion of federal-state relations: "*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development. Yet this decision has stood while the world of which it was a part has passed away. We conclude that it may stand no longer." *Puerto Rico v. Branstad*, 483 U.S. 219, 230, 107 S.Ct. 2802, 2809, 97 L.Ed. 2d 187, 197 (1987). The inflexible "19th century view" reflected in *Dennison* is also incompatible with the much of the First and Second Congresses' legislation discussed earlier.

In fact, the Brady Act provisions at issue here pass constitutional muster even under the more exacting Tenth Amendment standard in Justice O'Connor's partial dissent in *FERC*. Under Justice O'Connor's approach in that opinion, a congressional enactment violates the Tenth Amendment if it regulates "'States as States,'" addresses "matters that are indisputably 'attribute[s] of State sovereignty'" and "directly impair[s] [the State's] ability to 'structure integral operations in areas of traditional governmental functions.'" 456 U.S. at 778, 102 S.Ct. at 2147 (quoting *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. at 287-288, 101 S.Ct. 2352, 2365-2366, and *National League of Cities v. Usery*, 426 U.S. 833, 854, 845, 852, 96 S.Ct. 2465, 2475, 2471, 2474, 49 L.Ed. 2d at 245, 259, 253, 257)). Moreover, as Justice O'Connor recognized in her *FERC* partial dissent, there may be situations where a particular law transgresses the Tenth Amendment principles listed above, but is nonetheless valid because "the nature of the federal interest advanced may be such that it justifies the State's submission." 456 U.S. at 778, 102 S.Ct. at 2147, n.4, 72 L.Ed. 2d at 559 (quoting *Hodel*, 452 U.S. at 288 n.29, 101 S.Ct. at 2366 n.29).

Applying the analysis from Justice O'Connor's partial dissent in *FERC* to the Brady Act reveals that the Brady Act requirements are far more respectful of Tenth Amendment values than the scheme upheld by the majority in *FERC*. The statute in *FERC* regulated the "States as States" because, through federal law, Congress directed state agencies to undertake an extensive review of detailed standards. In contrast, the Brady Act primarily regulates private, individual conduct--handgun transfers--and requires only the incidental and temporary *assistance* of state officials. Moreover, whereas the laws at issue in *FERC*

usurped State decisionmaking and policymaking procedures by setting "agendas" for state agencies exercising delegated legislative power, *id.* at 780, 102 S.Ct. at 2147-2148, 72 L.Ed. 2d 532, the Brady Act merely requires ministerial assistance from law enforcement officers and does not dictate procedures or decisionmaking; in fact, quite to the contrary, the Brady Act leaves complete discretion to state officials to determine, based on circumstances unique to each CLEO, how the background checks are to be performed and what priority they should have among other state law enforcement activities. Finally, whereas Justice O'Connor found that the statute in *FERC* impaired States' ability to "structure integral operations in areas of traditional government functions," the Brady Act asks law enforcement officers to undertake an activity--ascertaining criminal history--that is already part of their normal duties, and affords those officers discretion to decide what is a "reasonable effort" under the circumstances.

Justice O'Connor also observed that there may exist situations where a particular law that violates these principles should be upheld because "the nature of the federal interest advanced may be such that it justifies the State's submission." 456 U.S. at 778 n.4, 102 S.Ct. at 2147 n.4, 72 L.Ed. 2d at 559 n.4 (quoting *Hodel*, 452 U.S. at 288 n.29, 101 S.Ct. at 2366 n.29). Although there is no need to reach this question here, because the Brady Act does not otherwise violate the Tenth Amendment, the nationwide epidemic of handgun violence clearly qualifies as a unique example of a problem compelling State cooperation in a nationwide solution. The goals of the Brady Act would be thwarted if felons could purchase handguns in some States without any background check. Hence, the nature of the federal interest in ensuring that there is nowhere in America that felons can legally purchase handguns on the spot

justifies requiring state cooperation with these interim measures. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. ___, ___, 115 S.Ct. 1842, 1873, 131 L.Ed. 2d 881 (1995) (Kennedy, J., concurring) ("the political identity of the entire people of the Union is reinforced by the proposition . . . that, though limited as to its objects, the National Government is and must be controlled by the people without collateral interference by the States.")

B. The Brady Act Does Not Commandeer State Decisionmaking Authority

The Brady Act is also consonant with the strong Tenth Amendment values embodied in the majority opinion in *New York*. As noted in that case, the content of state sovereignty under the Tenth Amendment is not evident from the tautological language of that provision; rather, Tenth Amendment cases require the Court to interpret the intricate relationship between federal and state power wrought by the Framers of the Constitution. 112 S.Ct. at 2419. Applying the analysis and substantive Tenth Amendment standards found in *New York* to this case leads to the conclusion that the Brady Act should be upheld.

In *New York*, the Court considered a type of federal regulation qualitatively different from the Brady Act, one that invaded the province of State sovereignty in a way the Brady Act does not. Unlike the Brady Act, the statute in *New York* coerced States into enacting a regulatory scheme, raising the question whether "Congress may direct or otherwise motivate the States to regulate in a particular field or in a particular way." 505 U.S. at 161, 112 S.Ct. at 2420, 120 L.Ed. 2d at 140. The federal hazardous waste legislation provision found unconstitutional in *New York* put States in the untenable position of either regulating according to Congress's direction or taking title to--

accepting a "forced transfer" of--hazardous waste. Because Congress lacked the power to do either of these things independently, it could not require States to choose between the two alternatives: "A choice between two unconstitutionally coercive regulatory techniques is no choice at all." 505 U.S. at 176, 112 S.Ct. at 2428, 120 L. Ed. 2d at 150. Such a scheme effectively "'commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* (quoting *Hodel*, 452 U.S. at 288, 101 S.Ct. at 2366). This Court properly held that no "constitutional provision authorizes Congress to command state legislatures to legislate," 505 U.S. at 179, 112 S.Ct. at 2430, 120 L.Ed. 2d at 152, as the statute at issue there did. The consequences of failing to take legislative action in New York were extreme: States would be required to "take title" to radioactive waste.

Hence, among its other defects, the statute in New York directly regulated "the States as States." *Cf. FERC*, 456 U.S. at 778, 102 S.Ct. at 2147 (O'Connor, J., concurring in part and dissenting in part). The Brady Act, by contrast, regulates private individual conduct, with the minimal, short-term assistance of state and local officials. This distinction, between the permissible regulation of individuals and the forbidden regulation of States, was the animating principle of *New York*: "In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." 505 U.S. at 166, 112 S.Ct. at 2423, 120 L.Ed. 2d at 144; *see also* 505 U.S. at 164, 112 S.Ct. at 2422, 120 L.Ed. 2d at 143 ("In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States."). Significantly,

the First and Second Congress, which, as discussed earlier, imposed various duties on state executive officials, were obviously sensitive to avoiding measures that affected the exercise of state legislative authority. These Congresses did not enact statutes that imposed mandatory duties upon the state legislatures, but rather acted by means of "Resolutions" that made "Recommendations" to the state legislatures. *See, e.g.*, Resolution No. 2, September 23, 1789, 1 Stat. 264 (1789) (recommending "to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof").

The Brady Act respects this constitutional principle. Unlike the hazardous waste law in *New York*, the Brady Act does not "command state legislatures to legislate," *New York*, 505 U.S. at 179, 112 S.Ct. at 2430, 120 L.Ed. 2d at 152, or otherwise usurp the State's sovereign decisionmaking or policymaking authority. Instead, it merely requires state executive officials to make a reasonable effort, tailored to local circumstances, to carry out a ministerial act in furtherance of a goal of national importance--regulating handgun sales. The information to be considered, moreover, is available for the most part in the NCIC's computerized criminal history file, which state and local law enforcement officers use on a daily basis. In sum, because the Brady Act's requirements of state executive officials are reasonable in view of the corresponding benefits received, are minimally intrusive, and are imposed only on an interim basis, they pass muster under the Tenth Amendment.

CONCLUSION

For the foregoing reasons, as well as those stated in the Briefs for the United States and its other supporting amici, this Court should uphold the constitutionality of the Brady Act under the Tenth Amendment.

Respectfully submitted,

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Nos. 95-1478 and 95-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAY PRINTZ, SHERIFF/CORONER, RAVILLI COUNTY, MONTANA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

RICHARD MACK, SHERIFF, GRAHAM COUNTY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT.

INTEREST OF *AMICUS CURIAE*

The Association of the Bar of the City of New York ("the Association") is a professional association of more than 20,000 attorneys. Since its inception, the Association has worked to promote legal reform to enhance the quality of life

and the rule of law in the Nation generally, and in particular in the Nation's cities. Indeed, the Association was founded in 1870 to address the corruption and lawlessness that pervaded New York City at that time and deprived its citizens of the liberty and security that the rule of law exists to ensure. The challenges facing urban America have changed somewhat since that time, but the Association's mission has not.

Today, few dangers imperil the security of life and the rule of law in urban America more than its horrific levels of gun-related violence. Statistics abound to demonstrate the severity of this national crisis, but reference to just one suffices to make the point: according to figures assembled by the Center to Prevent Handgun Violence from foreign and FBI reports, in 1992, the year prior to the enactment of the Brady Act, "handguns were used to murder 36 people in Sweden, 97 in Switzerland, 60 in Japan, 128 in Canada, 33 in Great Britain, 13 in Australia and 13,495 in the United States." *See* Center to Prevent Handgun Violence, "Firearm Facts", April 1996.

It was this threat that moved Congress to enact the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922 *et seq.*, ("the Brady Act"). The Association has followed the history of this legislation with keen interest for several years and has previously defended it from the arguments of opponents of gun control that the legislation violated the Second Amendment.[1] With the consent of both petitioners and respondent, the Association now respectfully urges this Court, as *amicus curiae*, to reject the contention that this critical piece of national gun control legislation offends the Tenth Amendment.

SUMMARY OF ARGUMENT

Petitioners effectively ask this Court to resurrect the archaic notion that the federal government may never impose any obligation on state officials, no matter how temporary or ministerial or how compelling the national crisis that prompts

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[1] *See* 48 *The Record of the Association of the Bar of the City of New York*, p. 993 (December 1993).

the federal action may be. Any construction of the Tenth Amendment that so radically restrains the power of the federal government to enlist the temporary aid of state officers in addressing a dire national problem would disserve both the health and safety of the Nation and the interests of modern federalism.

Moreover, the Brady Act does not offend the sovereignty of the states because it does not commandeer their legislative processes. Rather, it temporarily requires state officers to make a "reasonable" search through "available" records to determine whether there is anything in a prospective gun purchaser's background that would disqualify that individual from receiving the weapon under federally established standards. The interim background check provisions of the Brady Act neither require state officers to establish substantive standards nor to regulate or administer commerce in weapons in any discretionary manner. The duties imposed on state officers are minimal, ministerial and temporary and pose no serious threat either of blurring lines of political accountability between state and federal officials or of impermissibly burdening the states with added obligations. The Brady Act is an expression of the Nation's desire that the federal and state sovereigns cooperate to stem the devastating tide of gun violence that currently besets it. The Association urges the Court to uphold it.

ARGUMENT

I. The Legislation

The Brady Handgun Violence Prevention Act amends title I of the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*. The Act makes it unlawful for a firearms dealer to transfer guns to certain categories of people.[2] The Act requires that,

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[2] Specifically, the Brady Act makes it unlawful for a dealer to transfer firearms to a person who: is under indictment for or has been convicted of a crime punishable by one year or more in prison; is a fugitive from justice; is addicted to or is an unlawful user of certain controlled substances; is an adjudicated mental defective or committed to a mental institution; is

(Footnote continued)

within five years of the effective date of the Act (*i.e.*, by November 1998), the Department of Justice develop a national criminal background check system to permit instantaneous determination as to whether anything in a prospective purchaser's history would render the sale unlawful. § 922(t).

In the interim, the Act requires a five-day waiting period during which background checks are to take place. § 922(s)(2). This provision does not apply in states that require pre-purchase background checks, § 922(s)(1)(D), or permits and pre-permit background checks, § 922(s)(1)(c). To effectuate the background check, gun dealers are required to obtain statements from prospective purchasers, on forms prepared by the Bureau of Alcohol, Tobacco and Firearms, and to forward those statements to the Chief Law Enforcement Officer ("CLEO") of the of the prospective purchaser's place of residence. § 922(s)(1)(A)(i).

The Act further requires that a CLEO "to whom a transferor has provided notice . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and a national system designated by the Attorney General." § 922(s)(2). If the CLEO does not find that the sale would violate the law, he or she must destroy any information provided by the statement within 20 days. § 922(s)(6)(B)(i). If the CLEO determines that the sale would violate the law, the rejected purchaser may demand that the CLEO provide in writing the reasons for the rejection within 20 days of receiving a request for such an explanation. § 922(s)(6)(c). It is these "interim background check provisions" that petitioners assail as violative of the Tenth Amendment.

The debate over the interim background check provisions is part of the larger, perennial debate on the interplay between

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an illegal alien; has been dishonorably discharged from the military; has renounced United States citizenship; or is subject to certain classes of restraining or protective orders. *See* 18 U.S.C. § 922(g).

the power of Congress to regulate interstate commerce and the powers reserved to the states under the Tenth Amendment. The Association's analysis begins with the assumption that, given the fact that the Brady Act directly regulates commerce in firearms, and given the considerable impact that firearm related crime has on interstate commerce, the Brady Act is manifestly a legitimate exercise of Congressional authority under the Commerce clause. *See Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), *cert. granted sub. nom. Printz v. United States*, 116 S.Ct. 2521 (June 17, 1996).

Petitioners contend that the Tenth Amendment constrains Congressional authority to require state officers to engage in the interim background checks[3], principally invoking the Court's treatment of the Tenth Amendment in *New York v. United States*, 505 U.S. 144 (1992). There, the Court considered the Low-Level Radioactive Waste Policy Amendments Act of 1985, which sought to encourage the states to assume responsibility for low level radioactive wastes. Along with monetary and access incentives, which the Court found constitutionally unobjectionable, the legislation also featured a "take-title" provision by which states were required either to adopt a waste disposal regime consistent with certain congressionally mandated standards or take title to private waste disposal sites within their borders. Writing for the Court, Justice O'Connor held that "Congress may not simply 'commandee[r] the legislative processes of the States' by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161 quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n. Inc.*, 452 U.S. 264, 288 (1982). The Court ruled that either of the options forced upon the states by the "take title" provisions -- adopting federally mandated standards or taking title to private waste sites -- "would 'commandeer' state governments into the service of federal regulatory purposes and for this reason would be inconsistent

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[3] The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." U.S. Const., Amend. X.

with the Constitution's division of authority between federal and state governments." *Id.*

Taking their lead from the foregoing language in *New York*, the petitioners attack the interim background check provisions as unconstitutionally foisting obligations on state officers in the service of a federal regulatory program. As set forth more fully below, the Association believes that these concerns are appropriately answered by the opinions of the Ninth Circuit below, *Mack v. United States*, 66 F.3d 1025 and of the Second Circuit in *Frank v. United States*, 78 F.3d 815 (2nd Cir., March 14, 1996). We urge the Court to embrace the reasoning of these opinions.

II. The Brady Act Is Not Structurally Offensive to the Tenth Amendment.

The petitioners contend that the interim background check provisions undermine the sovereignty of the states. As stated by petitioner Mack, "[u]nder § 922(s), the officials of the State -- holding offices established, empowered, and funded by its people -- are no longer under the command of the State and its people." Mack Br. at 334. The Brady Act thus is said to run afoul of the Court's teaching that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161, quoting *Hodel*, 452 U.S. at 288.

The duties imposed by the Brady Act on the CLEOs, however, are temporary and essentially ministerial. By arguing that the Tenth Amendment precludes even so minimal a federal obligation on state officers, petitioners effectively urge the Court to return the jurisprudence of the Tenth Amendment to the nineteenth century, when it was held that the federal sovereign might *never* compel *any* action by state officers -- a

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[4] Citations herein to the briefs of petitioners Printz and Mack take the forms "Printz Br. at __" and Mack Br.at ___," respectively.

position this Court properly rejected in *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982):

> ...the 19th century view, expressed in a well-known slavery case, was that Congress "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." *Kentucky v. Dennison*, 24 How. 66, 107, 16 L. Ed 717 (1861).
>
> Recent cases, however, demonstrate that this rigid and isolated statement... -- which suggests that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns -- is not representative of the law today. While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations..., there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions.

(*citations omitted*); *see also Frank*, 78 F.2d at 827 ("*New York* did not purport to revert to the 19th-century rule that the federal government may never impose obligations on state officers"); *accord*, *Mack*, 66 F.3d at 1029. If the Court accepts petitioners' argument that the Tenth Amendment is offended by a federally required reasonable check through available records for a few years until the federal government itself can assume the full burden, it will deprive the federal sovereign of all power ever to compel any help from the states to address national problems.

The Court should also reject the contention of petitioners that the interim provisions, regardless of the degree of burden they actually impose, necessarily intrude upon what the Second Circuit has termed the "structural" role of the states in the system of federalism. *Frank*, 78 F.3d at 827. The Brady Act does not direct or coerce the states to enact legislation or to promulgate regulations, *cf. New York*. True, it does require the implementation of the interim background checks if the state does not enact its own background check or permit system.

However, unlike the onerous and coercive option Congress presented to the states in *New York*, the interim background provisions are modest measures which do not mandate, or even significantly encourage, the states to legislate or regulate at all. *See Frank*, 78 F.3d at 827; *see also Mack*, 66 F.3d at 1030 ("*New York* was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act. The constitutional evil . . . [was that] the federal government was attempting to direct the States to enact their own legislation or regulations according to a federal formula"). Instead, as the Second Circuit explained, "the Brady Act is an exercise of Congress's power to regulate individuals." *Frank*, 78 F.3d at 827. The Ninth Circuit, too, noted that the Act "does not embody a mandate to the 'States' in the sovereign sense . . . The Brady Act is a regulatory program aimed at individuals and not the States." *Mack*, 66 F.3d at 1031.

The Fifth Circuit has reasoned, however, that by drafting the interim provisions of the Brady Act to run to the CLEOs directly rather than to the state legislatures, "Congress engaged in a certain legislative legerdemain" with results that "are tantamount to forced state legislation" because they "effectively bypass the state legislative process and substantively change the enacted policies of state governments." *Koog v. United States*, 79 F.3d 452, 458 (5th Cir., March 21, 1996). Indeed, the Fifth Circuit implied that because they "bypass" the state legislative processes, the interim provisions are even more offensive to the Tenth Amendment than the "take title" provisions at issue in *New York*. *Id.* at 460. But the Fifth Circuit has misconstrued the nature of the state sovereignty *New York* sought to protect:

> Congress is, according to *New York*, barred under the Tenth Amendment from compelling state legislatures to enact legislation because the federal government may not commandeer the basic decisionmaking processes of state government. This view is reinforced by the Supreme Court's repeated reference to *Hodel*, which upheld provisions of the

> Surface Mining Control and Reclamation Act of 1977 because that statute did not compel the States to enact and enforce a federal regulatory program and thereby take over the States' legislative processes...The offending provision in *New York* -- because it required States to enact their own regulatory solution -- was the sort of unconstitutional legislation alluded to in *Hodel*.

Frank, 78 F.2d at 828 (*citations omitted*). Thus, requiring local officials to check available records is simply not, for constitutional purposes, the same thing as hijacking the statehouse.

In their zeal to depict the Brady Act as invasive of state sovereignty, petitioners overstate somewhat the contemplated role of the interim provisions. Mack argues that they will force him to serve as an "ajudicator" (Mack Br. at 25-26); petitioner Printz laments that the Brady Act "usurps the most fundamental element of state sovereignty: the administration of criminal justice." (Printz Br. at 28). In fact, the Brady Act does not require petitioners to determine the substantive standards by which a person may or may not receive a gun; those standards have already been set by Congress. The interim provisions simply require CLEOs to check some records for evidence of disqualifying facts in a prospective purchaser's background. This task is certainly ministerial -- indeed, it is little more than clerical and cloaks the CLEO with no greater substantive authority than the state has chosen to do.

III. The Brady Act Will Not Blur Political Accountability of State Law Enforcement Officials.

Petitioners also complain that performance of the interim background checks and related tasks will subject them to political backlash for the actions of Congress. The Tenth Amendment, to be sure, serves in part to protect against a blurring of the lines of political accountability between elected officials of the federal and state governments.

Petitioners' contentions that the interim provisions will undermine political accountability, however, lack merit.

In *New York* Justice O'Connor wrote that it "will be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. at 169. That consideration is not present here. When the federal government requires the States to enact legislation the result is, obviously, *state* legislation. *Mack*, 66 F.3d at 1031. By contrast when "the federal government itself imposes a requirement on a state official, the requirement is more clearly an act of the federal government and thus does not, to the same extent, undermine political accountability." *Id.*

Indeed, in *Frank*, the Second Circuit not only rejected the contention that the Act would unconstitutionally subject state officials to adverse political consequences, but also suggested that the rule urged by the CLEOs would create a risk that

> federal officials could shift the blame for *inaction* by attributing persistent national problems, such as handgun violence, to the intransigence of local officials.... [or] the possibility that federal officials could consistently surrender responsibility for national problems by invoking abstract notions of "federalism" which would result in dissipation, as opposed to a mere shifting, of political responsibility.

78 F.3d at 828-29. Thus, considerations of political accountability which *New York* found in the Tenth Amendment support, rather than undercut, the constitutionality of the Brady Act.

IV. The Brady Act Does Not Unduly Burden State Law Enforcement Officers.

Apart from structural or political considerations, petitioners also object to the interim background check provisions on the ground that the duties they impose will prevent petitioners

from performing the rest of their job to such a degree as to violate the Tenth Amendment.

The Second and Ninth Circuits both considered whether the interim provisions violate the Tenth Amendment by imposing so great a burden on the state law enforcement apparatus that they effectively reduce the ability of the CLEOs to perform their state duties or enforce state law. The Ninth Circuit did acknowledge that "the federal government cannot stall the state government in its tracks by imposing all-consuming federal duties on the State's employees." *Mack*, 66 F.3d at 1032. However, nothing on the record before it caused the court below to believe that the Act was so burdensome, and the court suggested that a challenge based on such burdensomeness would not be ripe for resolution. The Ninth Circuit also held that the obligation on state officers in the Brady Act is no more burdensome than federally-imposed duties of state officers to report missing children or traffic fatalities. *Id.* at 1029-30.

The Second Circuit similarly concluded that the interim background check provisions were not impermissibly burdensome. That court invoked principles of statutory interpretation requiring it to avoid, whenever possible, interpretations of legislation which raise "serious constitutional problems". *Frank*, 78 F.3d at 830-31. Notwithstanding their complaints about the time required to perform and document background checks, the record does not show, and petitioners do not contend, that the interim provisions work so great a burden on them as to stall the sheriffs' offices in their tracks. If, someday, such a situation actually arose and the United States took the position that the interim provisions had to be complied with nonetheless, the affected CLEO would have a basis to attack the constitutionality of the statute as applied. But that is a question for another day; nothing on the face of the Brady Act foreshadows any such difficulty. Accordingly, the Court should not invalidate an otherwise constitutional statute on the basis of a hypothetical concern.

Additionally, as the Second Circuit pointed out in Frank, the Act "simply requires a 'reasonable effort' and directs that the background check include searching state and local records only if they are 'available'" and leaves it largely up to the CLEO in question as to what amounts to a "reasonable effort" under the circumstances. *Id.*

V. Conclusion

It is the legislatively expressed will of the people of the Nation, as the enactment of the Brady Act itself demonstrates, that inroads be made in the profusion of gun sales to potentially dangerous individuals and that the federal and state sovereigns cooperate, temporarily, in addressing that danger. Any interpretation of the Tenth Amendment that frustrates the will of the people in such matters would, in our judgment, disserve the interests of both the states and the Union in our system of modern federalism.

Respectfully submitted,

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether Congress may direct state and local officials to provide minimal ministerial help in implementing Federal legislation.

2. Whether, even if the challenged portions of the Brady Act violate the Constitution, they are severable from the remainder of the Act.

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BRIEF OF *AMICI CURIAE* SENATORS HERB KOHL, PAUL SIMON, JOHN CHAFEE, EDWARD M. KENNEDY, DIANNE FEINSTEIN, JOHN KERRY, FRANK LAUTENBERG, TOM HARKIN, BILL BRADLEY, CAROL MOSELEY-BRAUN, AND BOB KERREY IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Amici are a bipartisan group of 11 United States Senators who sponsored and worked for the passage of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, tit. I, 107 Stat. 1536 (1993) ("the Brady Act"). Through the Brady Act, *amici* forged a simple — and very effective — tool to combat the epidemic of handgun violence plaguing our nation: federally mandated background checks aimed at keeping guns out of the hands of violent criminals, drug abusers and others prohibited by law from possessing firearms. As a direct result of these background checks, more than 100,000 felons and other prohibited persons have been prevented from purchasing handguns over the past three years alone. *Amici* have a strong interest in ensuring that this extraordinarily successful — and lifesaving — legislation be allowed to continue in force.

Amici also have a second, broader interest in this case. From its earliest sessions, Congress has understood its powers under the Constitution to include the flexibility to enlist the ministerial aid of local officials in executing federal legislation. It accordingly has enacted numerous measures that direct local officials to provide minor assistance in implementing federal law. Adopting the position advanced by petitioners in this case would throw the constitutionality of those laws into doubt and would deny Congress the use of an important and longstanding strategy when crafting future legislation. *Amici* thus submit this brief to urge the Court to construe the federalism principles embodied in the Constitution in a manner that does not unduly restrict

Congress' ability to enact all laws that are necessary and proper to carrying out its constitutional duties.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress passed the Brady Act in response to "an epidemic of gun violence." H.R. Rep. No. 344, 103d Cong., 1st Sess. 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985.[1] As the House Report accompanying the legislation explained, handgun violence claimed the lives of more than 12,000 Americans in 1992, the year preceding the Brady Act's enactment. *Ibid.* During that same year, firearm-wielding criminals robbed or assaulted 530,000 Americans, and 15,000 American women were attacked by armed rapists. *Ibid.* This recurring violence took its toll not only on human lives, but also on the national economy; one study reviewed by Congress estimated that firearm injuries exacted $1.4 billion in medical costs and $19 billion in lost productivity each year. *Ibid.*

Although prior to the Brady Act, federal law prohibited convicted felons and other categories of persons from obtaining firearms, the ease with which those persons could obtain such weapons made it clear that more needed to be done.[2] Congress accordingly crafted the Brady Act to ensure that persons prohibited by law from obtaining handguns could no longer simply walk into a gun store and buy a handgun at will. Instead, from the Act's passage forward, it would be unlawful for federally licensed gun dealers to sell, deliver or

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[1] The Senate did not submit a report with the legislation.

[2] One survey of prison inmates, for example, found that 27 percent of armed felons purchased their guns at retail stores, and the experience of those States that already required background checks confirmed that an extremely large number of prohibited persons sought to obtain firearms through licensed dealers. See H.R. Rep. No. 344, *supra*, at 9-10.

transfer handguns to persons prohibited by federal law from obtaining such guns. 18 U.S.C. §§ 922(s)(1), (t)(1).[3]

The Act directs gun dealers to comply with this mandate in one of two ways. After the establishment of a national instant criminal background check system (to occur no later than early 1999), gun dealers will, with limited exceptions, have to contact that system prior to selling a handgun to a prospective purchaser. If the system informs the gun dealer that the prospective purchaser falls into one of the prohibited categories, the dealer may not consummate the sale. See 18 U.S.C. § 922(t).

Until the national system is up and running, however, the Act provides for an interim approach, which enlists the aid of local law enforcement officials in providing the information the gun dealer needs to determine whether he may consummate the sale. Under the interim system the dealer must, with limited exceptions, (1) obtain a statement from the prospective purchaser containing that person's name, address, and date of birth, as well as that person's statement that he or she does not fall into one of the categories of persons prohibited from purchasing a gun;[4] (2) verify the identification of the prospective purchaser; and (3) provide notice of the prospective purchaser's statement to the Chief Law Enforcement Officer ("CLEO") in the purchaser's place of residence. The dealer then may consummate the sale only

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[3] The Act's mandates do not apply in those States that have permit or background check requirements. 18 U.S.C. §§ 922(s)(1)(C)-(D), (t)(3)(A). 59 Fed. Reg. 37532-37534 provides a list of those States subject to the federal waiting period.

[4] Gun dealers use a form referring to the Bureau of Alcohol, Tobacco and Firearms and the "federal 5-day waiting period" to obtain this information. See Attachment 2 to Revised Brief of *Amici Curiae* Opposing Plaintiff's Motion for Preliminary Injunction, *Mack* v. *United States*.

after five business unless he receives notice from the CLEO that the sale would be unlawful. 18 U.S.C. § 922(s)(1).

Although the Act puts the primary onus of implementing its mandates upon gun dealers, it also imposes three requirements upon CLEOs: (1) to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [by the prospective purchaser of the handgun] would be in violation of the law * * *" (18 U.S.C. § 922(s)(2)); (2) to destroy any records relating to the background check within 20 business days if the background check does not indicate that the gun purchase would be unlawful (18 U.S.C. § 922(s)(6)(B)); and (3) if a person who was found to be ineligible so requests, to provide him with the reasons for his ineligibility in writing within 20 days (18 U.S.C. § 922(s)(6)(C)). Of course, these duties need not actually be performed by the CLEO: the statute allows the CLEO to designate another individual as the person responsible for background checks. 18 U.S.C. § 922(s)(8) (defining CLEO as "the chief of police * * * or an equivalent officer or the designee of any such individual").

CLEOs thus play a very limited role in the Brady Act's implementation — one that focuses exclusively on the procuring and providing of information and not at all on the enforcement of the Act. If, for example, the CLEO's background check reveals that the prospective purchaser is a convicted felon or otherwise prohibited from purchasing a handgun, the CLEO need not arrest the prospective purchaser for providing false information to the government.[5] Nor does the CLEO have any obligation to follow up with the gun dealer to determine whether he properly denied the prospective purchaser's request to obtain a handgun. And, of

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[5] It presumably would be up to federal law enforcement officers to charge any prospective purchaser who knowingly and willfully included false material information on his form with a violation of 18 U.S.C. § 1001.

course, if the gun dealer does, in fact, violate the Brady Act by selling the gun despite the information provided by the CLEO — or if a gun dealer within his jurisdiction refuses even to obtain the required information from his customers — nothing in the Brady Act requires, or, indeed, even authorizes, the CLEO to charge either the gun dealer or the purchaser with a violation of the law's mandates. Finally, the Act specifies that CLEOs may not face damages actions either for preventing a lawful sale or for failing to prevent the consummation of an unlawful one. 18 U.S.C. § 922(s)(7). And CLEOs are not subject to any criminal sanctions.

Thus understood, the three challenged provisions of the Brady Act (the requirements to make a reasonable effort at conducting a background check, to destroy records of those prospective purchasers who are permitted to buy handguns, and to provide reasons why a prospective purchaser may not purchase a handgun if requested) do not transgress against any Constitutional restriction on Congress' power.

This Court has never invalidated an Act of Congress on the ground that it required state or local officials to perform specified ministerial acts. History, precedent, and logic demonstrate that -- in contrast to a federal directive to enact a state law, which does violate the Tenth Amendment -- there is no flat constitutional prohibition against enlisting state employees to perform ministerial tasks. Because the Brady Act does not impose undue burdens on state or local officials, it should be upheld by this Court.

Even if part of the Brady Act is unconstitutional, it should be severed from the rest of the statute. Petitioners have failed to produce the required "strong evidence" that Congress would not have enacted the remainder of the statute. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987).

ARGUMENT

I. THE CHALLENGED PROVISIONS DO NOT VIOLATE THE CONSTITUTION.

Petitioners' submission to this Court is simple in appearance, yet radical in effect. Petitioners ask the Court to hold that the federal government may never direct a state or local official to perform *any* act, no matter how ministerial and trivial it might be. It is worth pausing to consider the dramatic implications of such a submission. Under petitioners' regime the federal government could not, for example, require state officials to do something as simple as report missing children or traffic fatality statistics to a central registry (see, *e.g.*, 42 U.S.C. § 5779(a); 23 U.S.C. § 402(a)); nor could the federal government direct state personnel to participate in actions as significant as emergency disaster relief. Not surprisingly, petitioners are unable to muster any support for their supposed black-letter rule.

To begin with, nothing in the text of the Constitution suggests the broad principle that Congress may not seek the aid of local officials in implementing federal law. To the contrary, the Constitution grants Congress broad authority "to regulate commerce * * * among several States" (Art. I, sec. 8, cl. 3) and "to make all laws necessary and proper for carrying into execution" that authority (Art. I, sec. 8, cl. 18), and it nowhere suggests that the term "*all* laws necessary and proper" (emphasis added) does not encompass those laws that enlist the aid of local officials. For this reason, the Tenth Amendment's reservation to the States of the "powers not delegated to the United States by the Constitution" cannot apply as a textual matter to the Brady Act, because Congress has, in fact, been delegated the power to make the law now being challenged. Accord *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548-551 (1985).

Moreover, this Court has never invalidated an Act of Congress on the ground that it required state or local officials to perform specified ministerial acts. Although the Court has recognized — in *New York* v. *United States*, 505 U.S. 144 (1992), and *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911) — limits on the authority of the federal government vis-a-vis the States, it has never endorsed the broad principle proffered by petitioners here. Rather, it has *upheld* federal statutes that impose ministerial obligations on state officials. See, *e.g.*, *Puerto Rico* v. *Branstad*, 483 U.S. 219, 229-230 (1987) (holding that the Extradition Act required the Governor of Iowa to extradite a fugitive to Puerto Rico).

Finally, as the Solicitor General and the other *amici* explain, both the Framers of the Constitution and the early Congresses clearly believed that the "necessary and proper" clause authorizes Congress to use state officials in carrying out federal legislation. See, *e.g.* The Federalist, No. 36 at 227 (Hamilton) (J. Cooke ed.) (Congress may use State officers and regulations to collect federal taxes); *id.*, No. 45 at 313 (Madison) ("[i]ndeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union"); *id.*, No. 27, at 174 (Hamilton) (the Constitution "will enable the government to employ the ordinary magistracy of each [state] in the execution of the laws"); Act of Mar. 26, 1790, ch. 3 § 1, 1 Stat. 103 (1790) (direction to state court clerks to record application of person seeking citizenship under federal law); Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567 (1798) (directing state court clerks, among others, to transmit declarations of intent to become citizens to Secretary of State).

More recent Congresses have continued to legislate in this vein, requiring state officials to assume a wide range of ministerial duties in the name of advancing Federal law. As we note above, for example, 42 U.S.C. § 5779(a), requires

State and local law enforcement agencies to report cases of missing children, and 23 U.S.C. § 402(a) mandates States to implement highway safety programs and to report traffic fatalities. Similarly, 15 U.S.C. § 2645 directs governors to take certain actions with respect to local educational agencies, while 42 U.S.C. § 11001 requires States to take certain actions with respect to the release of hazardous substances. See also, *e.g.*, 15 U.S.C. § 2224 (States must submit to federal government list of places of public accommodation); 42 U.S.C. § 6991c (requiring States to create inventory of underground storage tanks and submit it to federal agency).

Of course, these factors do not by themselves establish the validity of the statutory provisions challenged here. But they do demonstrate that acceptance of petitioners' extremely broad submission would represent a dramatic change in this Court's jurisprudence. In applying separation of powers principles, the Court has recognized that the Framers eschewed formalistic bright-line standards in favor of a more flexible analysis. See, *e.g.*, *Morrison* v. *Olson*, 487 U.S. 654, 693-694 (1988). The Court should follow the same approach here. Under that analysis, the Brady Act is plainly constitutional.

1. Resolving this case requires the Court to identify the nature and purpose of the controlling constitutional principle. Petitioners' formalistic rule necessarily rests on the assertion that the Constitution precludes any federal interference, no matter how trivial, with the formulation and implementation of state policy. That assertion, however, cannot be reconciled with the settled law that fleshes out the *limits* on the Tenth Amendment principle.

First, it is beyond dispute that Congress may displace state and local policy choices through its power of preemption; "it has always been the law that state legislative and judicial decisionmakers must give preclusive effect to federal enactments concerning nongovernmental activity, no matter what the strength of the competing local interests."

FERC v. *Mississippi*, 456 U.S. 742, 766 (1982). Through the exercise of this power Congress may act directly on state and local officials by requiring them to refrain from particular actions. And while a preemptive federal statute does not require state or local officials to perform affirmative acts, "a federal veto of the States' chosen method" of action is no "less intrusive in any realistic sense" than are mandates to act in a particular manner. *Id.* at 763 n.27.

Second, it has long been settled that Congress may seek to induce particular action on the part of States. Congress may, of course, "'attach conditions to the receipt of federal funds.'" *New York*, 505 U.S. at 167, quoting *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). And "where Congress has the authority to regulate private activity under the Commerce Clause, [the Court has] recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 167. That is so even when the choice of abandoning local regulation is unrealistic in the extreme, so that the federal rule will, as a practical matter, "'coerc[e] the States' into assuming a regulatory role by affecting their 'freedom to make decisions in areas of 'integral governmental functions.'" *FERC*, 456 U.S. at 766, quoting *Hodel* v. *Virginia Surface Mining & Recl. Ass'n, Inc.*, 452 U.S. 264, 289 (1981).

Third, the Court repeatedly has made clear that federal legislation does not transgress the Constitution's federalism principles simply because it imposes financial burdens upon the States: "'the determinative factor * * * is the nature of federal action, not the ultimate economic impact on the States.'" *FERC*, 456 U.S. at 770 n.33, quoting *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U.S. at 292 n. 33.[6] See *Garcia*, 469 U.S. at 555-556 ("Congress' action

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[6] *FERC* cannot be distinguished on the ground that States could

in affording [local government] employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause"); *South Carolina* v. *Baker*, 485 U.S. at 515 (observing that *Garcia* required some States and municipalities to raise funds necessary to comply with the overtime provisions of the FLSA). Petitioners therefore are wrong in contending that the mere fact that federal law dictates how they must use their resources gives them grounds to seek judicial redress.

Fourth, the Court has long recognized that Congress may impose certain direct, affirmative obligations on state officials. The Court thus has expressly rejected "the 19th-century view, expressed in a well-known slavery case, * * * that Congress 'has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it.'" *FERC*, 456 U.S. at 761, quoting *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66, 107 (1861). See *Puerto Rico* v. *Branstad*, 483 U.S. 219, 230 (1987) (overruling *Dennison*). Instead, "[w]hile th[e] Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, * * * there are instances where the Court has upheld federal structures that in effect directed state decisionmakers to take or refrain from taking certain actions," or that "impose[d] an affirmative obligation upon state officials." *FERC*, 456 U.S. at 763 n.27. See *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988); *Washington* v.

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choose whether or not to comply with the federal mandate there at issue. In fact, the statute challenged in *FERC* imposed significant costs upon the States regardless of what they chose to do; after all, the alternative to incurring the costs imposed by the statute — shutting down the State's entire utility regulation system — undoubtedly would be far from cost free. See *FERC*, 456 U.S. at 766 (recognizing difficulty in abandoning regulation of utilities where Congress failed to provide alternative to state regulation).

Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979).

Similarly, in *Testa* v. *Katt*, 330 U.S. 386 (1947), the Court held that Congress may require state courts to adjudicate causes of action created by federal law. Federal law thus may compel state court judges to hear and decide lawsuits that otherwise would not be entertained by these courts. See also *Mondou* v. *New York, N.H. & H. R. Co.*, 223 U.S. 1 (1912). The Court subsequently explained that, under the analysis of *Testa*, "the Federal Government has some power to enlist a branch of state government * * * to further federal ends." *FERC*, 456 U.S. at 762. And whatever may be said to distinguish these decisions on their facts from circumstances involving "congressional requirements that States regulate" (*New York*, 505 U.S. at 178), the Court's holding surely cannot be reconciled with petitioner's submission that Tenth Amendment principles wholly preclude the imposition of federal burdens on state and local officials.

2. Against this background, the controlling rule is clear: federalism principles come into play in this context only when Congress would "'directly compel[]' the States to enact a legislative program." *FERC*, 456 U.S. at 765. This rule follows from the Court's recognition that "having the power to make decisions and to set policy is what gives the State its sovereign nature." *Id.* at 761. This rule follows from the constitutional history indicating that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, *it lacks the power directly to compel the States to require or prohibit those acts.*" *New York*, 505 U.S. at 166 (emphasis added). See *id.* at 161-162. And this rule follows from what the Court has identified as the principal utilitarian value of Tenth Amendment limits on federal power: that "[a]ccountability is diminished" when "federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their

decision." *Id.* at 169. Moreover, given the undisputed congressional authority to impose very significant limits and obligations on state officials, a rule that prohibits the federal government only from *compelling state legislation* follows from what the Court, in the closely related setting of intergovernmental tax immunity, has described as the "essentially symbolic importance" of the constitutional limit. *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982).

This rule — that Congress may not "'directly compel[] [States] to enact and enforce a federal regulatory program'" (*New York*, 505 U.S. at 176, quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 288) — was the basis for the Court's decision in *New York*, the decision upon which petitioners hinge their entire argument. The Low-Level Radioactive Waste Policy Amendments Act of 1985 at issue in *New York* directed that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of * * * low-level radioactive waste generated within the State." 42 U.S.C. § 2021c(a)(1)(A). If a State did not comply with that mandate within the specified time frame, one section of the Act, known as the "take title" provision, directed that the State, "upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste * * *." 42 U.S.C. § 2021e(d)(2)(C). As the Court explained it, the Act presented States with two options, both of which compelled the State to adopt the federal policy as its own: either to enact the specified legislation or to take an action — assuming physical and financial responsibility for all low-level radioactive waste in its borders — that was tantamount to the adoption of the federally mandated policy.

In striking down the law, the Court focused exclusively on the prospect that States would be forced to enact

regulatory programs. The Court thus stated the issue in the case as "whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." 505 U.S. at 161. The principle the Court found to be controlling was the rule that Congress "lacks the power directly to compel the States to require or prohibit [specified] acts." *Id.* at 166. See *id.* at 161-163 (citation omitted) (Congress may not require States "'to enact and enforce a federal regulatory program'"); *id.* at 178 (emphasis in original) (Congress cannot "command a state government to enact *state* regulation"); *ibid.* (distinguishing cases that do not involve "congressional requirements that States regulate"); *id.* at 179 (Court's prior decisions "by no means imply any authority on the part of Congress to mandate state regulation"); *id.* at 180 (emphasis in original) ("the Framers did *not* intend that Congress should exercise [the commerce] power through the mechanism of mandating state regulation"). The consistency of this formulation in *New York* plainly suggests that the Court's holding was confined to circumstances where Congress directs the States to exercise their regulatory authority.

That conclusion is confirmed by the *New York* Court's analysis of the two-sided take title provision. The first option presented to the States — that of "regulating pursuant to Congress' direction" (505 U.S. at 174) — "would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction." *Id.* at 176.

The second option available to States — that of taking title to the radioactive waste and becoming liable for all of the waste generators' damages and liabilities — was similarly flawed. The forced transfer of title and liablity "would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers" (505 U.S. at 175), and therefore would effectively

treat the States as if they *had* enacted the federal program.[7] "Either way," the Court therefore concluded, "'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 176 (citation omitted).

3. Application of the controlling principle here makes clear that the Brady Act is a proper exercise of congressional authority. The Act does not require the States to enact *any* legislation, but rather directs state and local government employees to perform ministerial acts specified by federal law. It does not obligate state officials to exercise uniquely sovereign prescriptive authority; instead, it directs the CLEO to make the requisite background check only because he or she has best access to the relevant information.

The Act, moreover, plainly establishes a *federal* policy, and it imposes no obligation upon local officials to adopt that policy as their own. If a gun dealer refuses to obtain the mandated information from his customers, for example, the Brady Act does not require CLEOs to take any action against that dealer. If a gun dealer decides to sell a handgun to a purchaser whom the CLEO has told him is prohibited from obtaining a handgun, the CLEO need take no action. And, if a potential purchaser provides false information to the gun dealer (and therefore to the CLEO), the Brady Act provides no basis for the CLEO to take any action against that potential purchaser. Instead, the Brady Act leaves it to *federal* officers to enforce each and every one of its mandates, requiring CLEOs to do only one simple thing:

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[7] In addition, the take title requirement itself acted against the States in a uniquely intrusive manner. It required States to take title to property in their sovereign capacity, while subjecting States to actions for money damages. This requirement, which implicated the state sovereign immunity recognized by the Eleventh Amendment, was inconsistent with central notions of sovereignty.

provide information to gun dealers so that those dealers may comply with the federal law.

Thus, the Brady Act not only is functionally different from the statute found offensive in *New York*; it also does not raise any of the accountability concerns cited by the Court. The federal government enacted the law "in full view of the public" (*New York*, 505 U.S. at 168), and every interaction the citizenry has with the law's enforcement provides a reminder that it was federal, not state, officials, who are charged with enforcing its dictates. Again, when prospective purchasers attempt to purchase a handgun, they are immediately informed that *federal* law requires a background check and a five-day waiting period.[8] If any person violates the law's mandates, they will have only *federal*, not state officials to face. And, although CLEOs do have a statutory obligation to inform persons denied guns of the reasons for the denial upon their request, there is nothing preventing those CLEOs from including in their letter the truthful statement that it is due to *federal* law that they are being denied a gun.

4. While it therefore is plain that the Brady Act does not run afoul of the federalism principles that underlay *New York*, we do not suggest that the federal government is free to impose limitless burdens on the personnel of state and local governments. In the past, the Court has suggested that, in practice, the Tenth Amendment may take account of "the degree to which [federal] laws would prevent the State from functioning as a sovereign." *New York*, 505 U.S. at 177. It thus may be that federal laws that are exceptionally intrusive in the demands that they place upon state employees may run up against "the general conviction that the Constitution precludes 'the National Government [from] devour[ing] the

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[8] See Department of Treasury, Bureau of Alcohol, Tobacco and Firearms Form, used by gun dealers to obtain required information from purchasers, note 4, *supra*.

essentials of state sovereignty.'" *Garcia*, 469 U.S. at 547 (citation omitted) (bracketed material added by the Court).

But there is no need for the Court, in this case, to consider the outer limits of any such restriction on federal authority. The limited and ministerial burdens imposed by the Brady Act do not remotely threaten the efficacy of state government. And the danger that any federal law will do so is remote; as Madison explained, the federal government "'will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.'" *Garcia*, 469 U.S. at 551, quoting The Federalist, No. 46, at 332 (B. Wright ed. 1961) (bracketed material added by the Court). In these circumstances,

> [t]he process of constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need [the Court] go beyond what is required for a reasoned disposition of the kind of controversy now before the Court.

New York v. *United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J.). Because the Brady Act does not compel the States to exercise their legislative powers and does not impose undue burdens on state or local officials, it should be upheld.

5. A brief review of the three provisions of the Brady Act challenged by petitioners confirms this conclusion. The burdens imposed on state or local officials are minimal.

Petitioners focus most of their attention on the requirement that the CLEO (or his or her designee) "make a reasonable effort to ascertain within 5 business days whether receipt or possession [by the prospective purchaser of the handgun] would be in violation of the law * * *" (18 U.S.C. § 922(s)(2)). Significantly, the CLEO need only make a

"reasonable effort": the requirement is thus flexible, not fixed. As the Second Circuit explained:

> Because the relevant circumstances — including the availability of resources, access to records, frequency of requests, and the likelihood that the CLEO will be personally acquainted with the transferee — will vary among different localities, what is a "reasonable effort" depends upon the jurisdiction. * * * The Brady Act's use of a highly subjective standard ensures that state officials are not excessively burdened.

Frank v. *United States*, 78 F.3d 815, 830 (2d Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3856 (Jun. 13, 1996) (No. 95-2006).

Petitioners also claim that the requirement that they destroy all statements from gun dealers after twenty days is independently unconstitutional. This claim borders on the frivolous. Can the Constitution possibly bar Congress from requiring the destruction of forms prepared pursuant to federal law? The burden is trivial — an employee simply must throw the forms into the garbage. And the federal government has a strong interest in controlling information created pursuant to federal law.

Finally, petitioners argue that federal law cannot require CLEOs to provide, if requested, the reasons why an individual was found to be ineligible to receive a gun. If the reasonable effort provision is constitutional, it is difficult to see why the requirement of an explanation would violate the Constitution. The additional burden is minimal. And due process may well impose this requirement in any event (see page 29, *infra*).

If the reasonable effort provision is unconstitutional, the explanation requirement would arise only if the CLEO voluntarily decided to conduct the background check. In that case, the requirement would flow not from federal law, but

rather from the CLEO's voluntary decision to perform the check. Like a grant condition that applies because of a State's voluntary decision to accept the federal funds, a condition on a CLEO's voluntary decision to perform a background check would not implicate the Tenth Amendment.

In sum, the limited — and entirely ministerial — duties imposed by the Brady Act do not violate the Constitution.

II. IF THE COURT CONCLUDES THAT ONE OR MORE OF THE CHALLENGED PROVISIONS ARE UNCONSTITUTIONAL, IT SHOULD SEVER THOSE PROVISIONS AND LEAVE THE REMAINDER OF THE ACT IN EFFECT.

If the Court concludes, contrary to our submission, that one or more of the challenged provisions of Section 922(s) are unconstitutional, the Court should sever those provisions and leave the remainder of the law in effect. Petitioners' contention that the entire subsection must be invalidated finds no support in this Court's jurisprudence. Indeed, petitioners' contentions have been rejected by the only court of appeals that has addressed this issue. See *Koog* v. *United States*, 79 F.3d 452, 463 (5th Cir. 1996).

"The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *New York* v. *United States*, 505 U.S. 144, 186 (1992) (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted)).

There can be no doubt that the latter test is satisfied here — the unchallenged portions of Section 922(s) are fully operative as a law. The invalidity of the "reasonable effort" provision simply would render the background check optional. The statute requires gun manufacturers, importers,

and dealers to submit information to the CLEO. The CLEO then could decide to conduct the background check within the five-day period or to do nothing.

Even if the Court concludes that the other two provisions challenged by petitioners are invalid, the statute is fully functional. CLEOs simply would not be required by federal law to discard Brady Act records within twenty days. And CLEOs who voluntarily conducted background checks would not be required by statute to provide on demand the reasons the CLEO determined that a person was ineligible to receive a gun.

The second part of the inquiry — whether it is "evident that the Legislature would not have enacted" the remaining provisions — varies depending upon whether "Congress has explicitly provided for severance by including a severability clause in this statute." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. at 686. Accordingly, the next step in the analysis is to ascertain whether a severability clause applies to Section 922(s).

Section 922(s) is part of chapter 44 of title 18 of the United States Code.[9] That chapter contains a severability clause, 18 U.S.C. § 928, which states that "[i]f any provision of this chapter * * * is held invalid, the remainder of the chapter * * * shall not be affected thereby."

Petitioners argue (Printz Br. 47-48) that the Section 928 severability clause does not apply to Section 922(s), relying on a footnote in *Alaska Airlines*. The situation here is completely different from the one before the Court in *Alaska Airlines*.

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[9] Chapter 44 was added to title 18 by the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Section 902, 82 Stat. 197, 226.

The statutory provision at issue in *Alaska Airlines* was Section 43 of the Airline Deregulation Act of 1978. Some provisions of the Deregulation Act were explicitly framed as amendments to the Federal Aviation Act of 1958. See, *e.g.*, 92 Stat. 1744 (Section 40 of the Deregulation Act "amended the Federal Aviation Act "by adding at the end thereof the following new title"). Section 43, by contrast, was not cast as an amendment to the Federal Aviation Act (see 92 Stat. 1750), but rather was subsequently codified with the provisions of the Aviation Act.

This Court concluded that "[t]he applicability of [the Federal Aviation Act's severability] clause to § 43 is in doubt, * * * because, unlike many other sections of the Deregulation Act, [Section 43] does not amend provisions of the Aviation Act or any other pre-existing statute, but instead establishes a new program." 480 U.S. at 686-687 n.8.

Here, of course, Section 922(s) *was* explicitly framed by Congress as an amendment of existing law. See Section 102(a)(1), 107 Stat. 1536 ("Section 922 of title 18, United States Code, is amended by adding at the end the following"). For that reason, the severability clause expressly applies to Section 922(s) and the doubt expressed in the *Alaska Airlines* footnote is wholly inapplicable in this case.[10]

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[10] Petitioners may try to argue that Section 922(s) adds a "new program" to chapter 44 of title 18, and that the severability clause should not apply for that reason. To begin with, it is clear that this Court used the phrase "new program" in *Alaska Airlines* to identify a statutory provision that was not framed as an amendment to existing law. See 480 U.S. at 686-687 n.8 (distinguishing between a provision amending a "pre-existing statute" and a "new program"). As we discuss in text, Section 922(s) plainly is not a "new program" within the meaning of *Alaska Airlines*.

Moreover, it would be nonsensical to hold that severability clauses in pre-existing statutes do not apply to provisions expressly

"This Court has held that the inclusion of [a severability] clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. at 686 (citations omitted). Accordingly, petitioners must provide "strong evidence" of congressional intent in order to prevent severance here.[11]

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framed as amendments to such statutes if the amendments constitute a "new program." Once an amendment is enacted it legally equivalent to the original statutory language and should be treated in the same manner as the original text. See, *e.g.*, *United States* v. *La Franca*, 282 U.S. 568, 576 (1931) (observing that statutes had been amended and stating that "as thus amended, these statutes now are to be read, as to all subsequent occurrences, as if they had originally been in the amended form"); *Blair* v. *City of Chicago*, 201 U.S. 400, 475 (1906) ("'[a] statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there'") (citation omitted). That standard would also be extremely difficult to apply: precisely when does a change in an existing statute amount to a "new program"? Clear rules of interpretation enable Congress to be certain about the legal effect of legislative action. The requisite clarity is provided by the general principle that an amendment to a statute will be governed by any severability provision applicable to that statute.

[11] Petitioners also contend (Printz Br. 48-49) that the severability clause contained in Section 928 only protects against invalidation of all of chapter 44 of title 18, but does not direct the severance of an invalid portion of one subsection from the remainder of that subsection. That argument is simply wrong. This Court repeatedly has relied upon clauses with language essentially identical to Section 928 in saving the valid portions of a subsection containing one or more unconstitutional provisions. See, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 932 (1983); *Electric Bond Co.* v. *SEC*, 303 U.S.

Petitioners cannot carry that burden. At the outset, it is important to emphasize the difficulty inherent in petitioners' task. This Court has recognized how hard it is to determine congressional intent with respect to legislation that *is* enacted based upon committee reports, floor statements, and other legislative history. It is much more difficult to use these sources to determine what Congress *might* have done with respect to hypothetical legislation if it had been aware of the constitutional limits on its authority. For that reason, the Court should insist on extremely clear evidence establishing a widespread congressional consensus before concluding that a party has met its burden of proving that constitutional provisions are not severable from unconstitutional ones.

Petitioners advance three separate arguments to show that Section 922(s) should be invalidated in its entirety. First, they contend that Congress would not have enacted a law with an optional background check. Second, they contend that Congress would not have enacted a law allowing local officials to retain gun sales records. Third, they contend Congress would not have enacted a statute without granting a person barred from purchasing a gun the right to obtain the reasons the CLEO determined that the person was ineligible to receive the gun. We address each argument in turn.

1. The statute that ultimately was enacted demonstrates that Congress preferred a mandatory background check coupled with a five-day waiting period over an optional background check. The question here, however, is whether petitioners have provided "strong evidence" that Congress would have preferred no background check at all to an optional background check. *Leavitt* v. *Jane L.*, 116 S. Ct. 2068, 2072 (1996) ("[t]he relevant question is whether the legislature would prefer not to have B [the constitutional

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419, 434 (1938).

portions of the law] if it could not have A [the unconstitutional portions] as well").

Much of petitioners' evidence is wholly irrelevant. For example, the fact that Congress rejected efforts to make the mandatory check into an optional check (Mack Br. 42; Printz Br. 35-37) shows only that Congress preferred a mandatory check, not that it would have chosen to eliminate background checks entirely if a mandatory check were not a permissible option.

Petitioners point to statements by several Members of an earlier Congress criticizing optional background checks because of the possibility of discrimination by local officials. See Mack Br. 43; Printz Br. 35 n.43. But only one of those Congressmen subsequently voted for a bill providing for mandatory background checks. See 137 Cong. Rec. H11756-H11757 (daily ed. Nov. 26, 1991). Because these Congressmen opposed *all* background checks, their statements are wholly irrelevant to the issue here. Cf. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Trades Council*, 485 U.S. 568, 584-585 (1988) (views of opponents not persuasive in interpreting legislation).

Thus, the only clear expression of support for no background check at all over an optional check is the statement by Representative Zimmer cited by petitioners. See Mack Br. 41-42; Printz Br. 37.[12] The statement of a single

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[12] The statement by Senator Mitchell cited by petitioner Printz (Br. 35 n.43) relates to a 14-day waiting period and therefore provides no evidence concerning Congress's likely view of a bill with a considerably shorter (five-day) waiting period. Senator Metzenbaum's statement (Printz Br. 38) merely explains the effect of the statutory provision and provides no evidence of his views concerning optional background checks. Senator Jeffords' statement (Printz Br. 37-38) reveals only that he would not support a waiting period without some background check provision; it does not indicate that he would have opposed the bill if the background

Congressman plainly does not provide the required "strong evidence" regarding the intent of the entire Congress.

There is, moreover, considerable evidence indicating that Congress would have preferred an optional background check to no background check at all. In 1991, the House of Representatives passed just such a measure by a 239-186 vote (H.R. Rep. No. 344, *supra*, at 14), a margin similar to the 238-187 majority that enacted the final provision (139 Cong. Rec. H10907-H10908 (daily ed. Nov. 23, 1993)). These votes show that the two approaches had roughly similar levels of support.

As we have discussed (see pages 1-2, *supra*), the principal goal of the Act's proponents was to combat the explosion of handgun violence by keeping guns out of the hands of those persons prohibited by law from possessing them. Simple logic compels the conclusion that if Congress were forced to choose between optional background checks and no checks at all, it would pick the former option. Congress was keenly aware that local law enforcement officers vigorously supported background checks.[13]

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check had been optional.

[13] A representative of the International Association of Police Chiefs testified that "compelled or not, we in law enforcement management want to conduct the background checks." *Brady Handgun Violence Prevention Act: Hearings on H.R. 1025 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 207 (1993) (testimony of David B. Mitchell, Chief of Police, Prince Georges county Police Department, Palmer Park, Md., on behalf of the International Association of Chiefs of Police); see also *Waiting Period Before the Sale, Delivery, or Transfer of a Handgun: Hearings on H.R. 975 and H.R. 155 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 100th Cong., 1st and 2d Sess. 33 (1987 - 1988) (testimony of Lawrence E. Whalen, Chief of Police, Cincinnati Police Division, on behalf of the International Association of Chiefs

Congress would logically assume that a considerable number of CLEOs would participate in a voluntary background check program, and — by establishing a nationwide mechanism to enable CLEOs to conduct these checks — Congress would thus further its goal of keeping weapons out of the hands of dangerous criminals. Although a voluntary program obviously might not be as comprehensive as a mandatory one, it would go a substantial way toward furthering Congress's objective.[14]

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of Police ("IACP")) (the IACP "will encourage its members to conduct a [background] check" in every instance if legislation leaves such checks to local law enforcement officials' discretion); *id.* at 358 (testimony of James Weber, Counsel, International Brotherhood of Police Officers) (police officers would not consider the process of completing a background check burdensome); *Handgun Violence Prevention Act of 1987, Hearings on S. 466 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 100th Cong., 1st Sess. 79 (1987) (testimony of Darwin McGlumphy, President, Akron Police Patrolmen's Association) (record checks conducted by local police departments part of the "daily operation" of police departments); *id.* at 84-85 (testimony of Darrel W. Stephens, Executive Director, Police Executive Research Forum) (costs associated with background checks are justified compared to costs of crime).

[14] Petitioner Mack is wrong in asserting (Br. 44-45) that severance will create inconsistencies in the statute. For example, he complains that a CLEO conducting voluntary checks will not be required to act within five days, but that requirement remains as a practical matter because the gun dealer is free to transfer the weapon after that period has expired. He also complains that States with optional background checks would not be excepted from the federal requirements, but, as we have discussed, Congress's goal was to create a program as comprehensive as the Constitution would permit, so there is no reason Congress would have waived the federal program and waiting period in States without mandatory background checks.

Petitioners argue (Mack Br. 42-43; Printz Br. 35) that in a jurisdiction in which the CLEO declines to perform background checks, the statute will impose a mandatory five-day waiting period, a result that Congress did not intend. Again, however, petitioners are unable to provide the necessary "strong evidence" that Congress would have rejected this result if it had known it could not mandate background checks. Congress recognized, as Senator Kohl put it, that

> [t]he waiting period not only gives us time to check criminal records, it gives individuals an opportunity to cool off. We all know that murders are often committed in the heat of the moment. * * * A waiting period prevents someone from getting a gun while consumed by passion.

137 Cong. Rec. S8939 (daily ed. June 27, 1991). Indeed, the National Rifle Association stated in 1976 that "'[a] waiting period could help in reducing crimes of passion and in preventing people with criminal records or dangerous mental illness from acquiring weapons.'" *Ibid.* (citation omitted). Many others in Congress echoed this view.[15]

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[15] See 139 Cong. Rec. S. 16413 (daily ed. Nov. 19, 1993) (Sen. Kennedy) (Brady Bill will "reduce the number of shootings by providing a cooling off period"); *id.* S16414 (Sen. Bradley) (one of bill's purposes is to "provide a cooling-off period"); *id.* H9089 (daily ed. Nov. 10, 1993) (Rep. Derrick) ("the waiting period will save lives by providing a cooling off period"); *id.* H9099 (Rep. Castle) (waiting period "allow[s] cooler heads to prevail"); *id.* H9106 (Rep. Roukema) (waiting period keeps "a flash of temper or moment of heated passion" from resulting in handgun violence); *id.* H9110 (Rep. Schenk) (waiting period would prevent individuals from "taking impulsive actions with deadly consequences"); *id.* H9113 (Rep. Andrews) ("5-day waiting period * * * provides a cooling off period"); *id.* H9114 (Rep. Clayton) ("waiting period[] would prevent impetuous and impulsive handgun purchases"); *id.*

In sum, logic and the available evidence indicate that Congress would have chosen to enact an optional background check. Petitioners have failed to carry their burden of presenting "strong evidence" to the contrary.

2. Petitioners' second claim (Printz Br. 38-43) is that all of Section 922(s) must be invalidated because Congress repeatedly has indicated its opposition to gun registration. This argument assumes that the record destruction requirement is independently unconstitutional and that CLEOs therefore will be able to retain the statements forwarded by gun manufacturers and dealers. If that provision is valid, CLEOs must destroy those statements, and therefore will not retain records of gun sales. Even if the record destruction requirement is independently invalid, however, it may be severed from the rest of Section 922(s).

Some Members of Congress plainly were concerned about the use of Brady Act records to create lists of gun owners. In addition to requiring the destruction of statements forwarded by gun manufacturers and dealers, the Act contains the following provisions regarding the use of these statements:

> (ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

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(Rep. Skaggs) (momentary passions "should not be indulged by immediate access to a deadly weapon"); *id.* H9118 (Rep. Stokes) (bill "prevent[s] purchases made in the heat of passion"; *id.* H756 (daily ed. Feb. 23, 1993) (Rep. Fingerhut) ("cooling-off period * * * may save them from taking somebody else's life"; see also *Hearings on H.R. 1025*, *supra*, at 77 (Asst. Atty. Gen'l Acheson) (bill "provides a cooling off period"); *id.* at 193 (Fraternal Order of Police) (supporting bill in part due to its "cooling-off period").

> (iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

18 U.S.C. § 922(s)(6)(B)(ii) & (iii). In view of these binding restrictions — whose validity petitioners do not challenge — there is no possibility that a CLEO could use Brady Act statements to establish a register of gun owners. Indeed, these restrictions are virtually identical to the protections in the permanent background check provision (see Section 103(i), 107 Stat. 1542), which petitioner Printz cites (Br. 40-41) as sufficient to "prohibit the registration of firearm owners." Certainly petitioners have failed to present "strong evidence" that Congress would have refused to enact the entire provision for fear that these two restrictions would be inadequate to prevent local officials from creating lists of gun owners.

Because the valid portions of Section 922(s) would prevent CLEOs from imposing gun registration, this Court should sever the record destruction provision and leave the remainder of the statute in effect.

3. Petitioners' final contention (Printz Br. 43-45) is that Section 922(s) should be invalidated in its entirety because Congress would not have enacted it without a provision requiring a CLEO to explain, upon request, why a purchaser is ineligible to receive a gun. Again, this argument assumes that the explanation requirement is independently unconstitutional — that a CLEO who voluntarily performs background checks cannot be required to supply the reasons for his determination. Even if the requirement is invalid, it is severable from the remainder of the statute.

The basis for petitioners' assertion is their contention that Congress was concerned that CLEOs might act arbitrarily in finding a purchaser ineligible. But a separate provision of the statute, 18 U.S.C. § 925A — which is entitled "[r]emedy for erroneous denial of firearm" — entitles any person to seek a

court order correcting erroneous actions by CLEOs. This protection, which petitioners do not challenge, provides a significant check on arbitrary action by a CLEO. Certainly petitioners have failed to present any "strong evidence" that Congress would have refused to enact the entire statute on the ground that this safeguard alone was inadequate.

Moreover, constitutional due process protections likely would be triggered if a CLEO found a purchaser ineligible to obtain a gun. See *Bell* v. *Burson*, 402 U.S. 535 (1971) (due process protections apply to suspension of drivers' license). Due process would require, at a minimum, that the individual be able to obtain the reasons for the adverse government action. See, *e.g.*, *Board of Curators* v. *Horowitz*, 435 U.S. 78, 85-86 (1978) (due process requires notice of charges). Thus, even if the statutory provision were invalidated, CLEOs would be required to provide an explanation of the determination that an individual is ineligible to receive a gun. There is, accordingly, no reason to invalidate the entire subsection, because ineligible persons still would be able to obtain the information that Congress wanted them to have.

Finally, even if the Constitution would not impose an explanation requirement, the entire background check provision should not be invalidated. Although petitioner Printz shows that the explanation provision had widespread support (Br. 43-45), he cites no evidence — let alone "strong evidence" — that Congress would have chosen to eliminate the entire background check provision if it had known that it could not require CLEOs to provide explanations.[16] Given Congress's intense interest in implementing background checks, petitioners simply cannot make that showing. This provision, too, is severable from the remainder of Section 922(s).

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[16] Significantly, the bill reported by the House Judiciary Committee did not contain this requirement. H.R. Rep. No. 344, *supra*, at 14.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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